93-618

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1993

No._____

UNITED STATES OF AMERICA,

Respondent,

v.

DAVID J. SHIELDS,

Petitioner.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER DAVID J. SHIELDS

DAN K. WEBB
STEVEN F. MOLO*
JAMES F. HURST
TIMOTHY P. O'CONNOR
WINSTON & STRAWN
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Petitioner
DAVID J. SHIELDS

* Counsel of Record

QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in interpreting 18 U.S.C. § 2517(5)—the key confidentiality provision of the federal wiretapping law—in a way that renders the statute's strict confidentiality requirements meaningless.

2. Whether the Seventh Circuit erred in interpreting Fed. R. Evid. 404(b) to allow the admission of prior bad acts evidence, without a proper limiting instruction, where that evidence is relevant only to a co-defendant's alleged propensity to commit the offense at issue.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner David J. Shields, his codefendant Pasquale F. DeLeo and the Respondent the United States of America.

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
I. This Court Should Grant The Writ On The Seventh Circuit's § 2517(5) Decision	4
A. Background Of Seventh Circuit's 18 U.S.C. § 2517(5) Decision	4
B. The Seventh Curcuit Renders the Clear Requirement of § 2517(5) Meaningless	5
II. This Court Should Grant The Writ On The Seventh Circuit's Federal Rule Of Evidence 404(b) Decision	8
A. Background Of Seventh Circuit's Federal Rule Of Evidence 404(b) Decision	8
B. The Seventh Circuit's Opinion Emasculates Rule 404(b)	10
CONCLUSION	14
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases

	Pages No(s).
Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992) .	8
Gelbard v. United States, 408 U.S. 41 (1972)	7
Huddleston v. United States, 485 U.S. 681 (1988)	9, 10
United States v. Brodson, 528 F.2d 214 (7th Cir. 1975) . .	7, 9
United States v. Giordano, 416 U.S. 505(1974)	7
United States v. Marion, 535 F.2d 697 (2d Cir. 1993) . . .	7
United States v. Williams, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985)	7
United States v. Shields, 999 F.2d 1090 (7th Cir. 1993)	*passim*
United States v. Zapata, 871 f.2d 616 (7th Cir 1989). . . .	10

Statutes

18 U.S.C. § 1001	4
18 U.S.C. § 1951	4
18 U.S.C. § 1952	4
28 U.S.C. § 1254	2
28 U.S.C. § 1291	4
Fed. R. App. P. 4(b)	4
Fed. R. Evid. 404(b)	3, 5, 6, 9, 10, 11, 12
18 U.S.C. § 1962	4
18 U.S.C. § 2517(5)	*passim*
18 U.S.C. § 3231	3
S. Rep. No. 1097, 90th Cong. 1st Sess. at 99-100 (1967)	7

In the
Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,
Respondent

v.

DAVID J. SHIELDS,
Petitioner

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

The Petitioner, David J. Shields, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for Seventh Circuit, entered in the above-entitled proceeding on July 14, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993) and is reprinted in the appendix at page A-1. The opinions of the district court addressing the questions presented by Petitioner Shields are reprinted at A-18 and A-80.

JURISDICTION

The Seventh Circuit affirmed Petitioner Shields' conviction on July 14, 1993 and denied his suggestion for rehearing in banc on August 27, 1993. A-1, A-85. This Court has jurisdiction to review the Seventh Circuit's decision under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 2517(5) (Supp. 1993). Authorization for disclosure and use of intercepted wire, oral, or electronic communications.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Fed. R. Evid. 404(b)

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Petitioner Shields, a former state court judge, was convicted of accepting bribes in connection with a fictitious case filed by the FBI. At trial, it was undisputed that a government informant named Robert Cooley gave bribe money to Pasquale F. DeLeo. The government contended that DeLeo passed the money to Shields. Shields contended that DeLeo kept Cooley's money and sold a phoney judicial fix instead. There was no direct evidence of Shields asking for or accepting a bribe — no witness, not tape recording, no document. The government relied most heavily on two hotly contested Title III tapes memorializing brief conversa-

tions between Shields and DeLeo. It also relied on the testimony, admitted under Fed. R. Evid. 404(b), of a convicted former judge, who said that he had accepted bribes from DeLeo in the early 1980s. The jury reached a verdict only after four days of deliberation and the Seventh Circuit recognized that "the government's case lack[ed] the kind of unassailable clarity one might wish to see in a prosecution of this sort." A-2.

The district court had jurisdiction over this case under 18 U.S.C. § 3231. The jury returned its guilty verdict against Shields on September 24, 1992 and the district court sentenced Shields on March 2, 1992. Shields filed a timely notice of appeal on March 12, 1992, giving the Seventh Circuit jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 4(b).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ on the Seventh Circuit's § 2517(5) Decision

A. Background Of Seventh Circuit's 18 U.S.C. § 2517(5) Decision

On August 29, 1988, the government obtained a Title III order authorizing the electronic surveillance of Shields' judicial chambers to intercept communications relating to only three offenses: conspiracy to extort (18 U.S.C. § 1951); extortion (18 U.S.C. § 1951); and payment of bribes under RICO (18 U.S.C. § 1962). (R. 87)[1] On August 31, 1988 and September 2, 1988, pursuant to that order, the government intercepted conversations between Shields and co-defendant DeLeo.

Over two years later, in October 1990, the government disclosed the intercepted conversations to a grand jury to indict Shields for offenses not specified in the August 29, 1989 Title III order. (R. 2) In addition to bribery under 18 U.S.C. § 1951, Shields was indicted for interstate travel to commit bribery (18 U.S.C. § 1952) (Count V) and making false statements to FBI agents (18 U.S.C.

---

1 Citations to the record below are denoted "R.___" and citations to the transcript are designated "Tr. ___."

§ 1001) (Counts VI and VII). By disclosing the intercepted conversations to the grand jury to indict Shields for offenses not specified in the Title III order, without first obtaining judicial approval, the government violated 18 U.S.C. § 2517(5), which prohibits unauthorized use of intercepted communications.

On March 11, 1991, Shields moved to dismiss the indictment on that ground. (R. 29) The government responded to the motion to dismiss for violation of § 2517(5) by seeking and obtaining an after-the-fact order approving the disclosure of interceptions relating to the Travel Act and false statement charges (Counts V, VI, and VII). (R. 54 at p. 57-58, R. 87) It then brought the intercepted statements before a second grand jury and, on May 31, 1991, announced a superseding indictment against Shields. (R. 68) The superseding indictment is identical to the original indictment. The district court denied defendants' motion to dismiss the superseding indictment, to dismiss the effected counts, or to suppress the Title III tapes based on the government's § 2517(5) violation. (R. 150)

B. The Seventh Circuit Renders The Clear Requirements Of § 2517(5) Meaningless

Interpreting § 2517(5) contrary to its plain language, the Seventh Circuit has invited government officials to ignore § 2517(5)'s requirements. Because the Seventh Circuit's decision nullifies the intended protections of § 2517(5), this issue is tremendously important, has far-reaching implications, and merits this Court's review. At stake are important privacy rights guaranteed by the Fourth Amendment and protected by the carefully crafted statutory scheme of Title III.

When enacting Title III, Congress "evinced [a] clear intent to make doubly sure that the statutory authority be used with restraint." *United States v. Giordano*, 416 U.S. 505, 514 (1974). Communications may be intercepted and disclosed only "upon compliance with stringent conditions." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). The disclosure of intercepted communications under Title III is governed by 18 U.S.C. § 2517, which provides in relevant part:

> [w]hen an investigative or law enforcement officer . . . intercepts . . . communications *relating to offenses*

> *other than those specified in the order of authorization or approval*, the contents thereof, and evidence derived therefrom, may be disclosed . . . *when approved by a judge* of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. *Such application shall be made as soon as practicable.*

18 U.S.C. § 2517(5) (emphasis added). Accordingly, judicial approval is required *prior* to disclosure of any intercepted communications that "relat[e] to offenses other than those specified in the order of authorization or approval"—even if the communications also relate to a specified offense. *United States v. Brodson*, 528 F.2d 214, 215 (7th Cir. 1975); *United States v. Williams*, 737 F.2d 594, 606 (7th Cir. 1984) ("[s]ection 2517(5) provides that before evidence can be used in the prosecution of an offense different from the one named in the original application, a separate application must be made to the court"), *cert. denied*, 470 U.S. 1003 (1985); S. Rep. No. 1097, 90th Cong. 1st Sess. at 99-100 (1967); *see also United States v. Marion*, 535 F.2d 697, 706 (2d Cir. 1976) (advocating "strict compliance with the requirements of § 2517(5)" and noting that "Congress carefully circumscribed utilization" of the "potentially dangerous law enforcement tools of electronic surveillance").

In this case, the Seventh Circuit effectively has held that the government is never required to comply with § 2517(5), never required to obtain judicial approval prior to disclosing communications relating to unspecified offenses, and certainly never required to obtain such approval "as soon as practicable." The Seventh Circuit did so by adopting an exception to § 2517(5) that swallows the rule, finding that

> belated approval cure[s] a defective original authorization if the original order was lawfully obtained, sought in good faith, and the questionable communication was incidentally intercepted during the course of a lawfully executed order.

A-11. As long as those three conditions are satisfied, according to the Seventh Circuit, the government's belated approval does not violate § 2517(5).

This exception to § 2517(5), found nowhere in the statute's language, eviscerates § 2517(5)'s key function. By requiring the government to obtain approval *prior to* disc' ›sure, § 2517(5) provides a judicial check designed to prevent the unauthorized use of interceptions. By creating an exception to § 2517(5) that permits *post*-disclosure judicial review, the Seventh Circuit has eliminated the judiciary's role in § 2517(5)'s scheme. Under the Seventh Circuit's exception, if the government is ever called to account for failing to obtain prior judicial approval, the only question is whether the government has met the three specified conditions. The government therefore would have no reason to seek prior judicial approval; the same three conditions would be considered whether the government seeks approval before or after disclosure. Accordingly, contrary to § 2517(5)'s express requirement, the government would not be required and would have no incentive to seek prior judicial approval.

The consequence of adopting a broad exception that ignores the language of § 2517(5) becomes evident when considering the circumstances of this case. Far from filing an application for judicial approval of its disclosure "as soon as practicable," the government first sought approval more than *two years* after the initial interception and more than *six months after* the initial disclosure. Faced with its evident failure to comply with § 2517(5), the government simply dismissed the original indictment, obtained a belated approval, and filed a superseding indictment. The Seventh Circuit held that the government did not violate § 2517(5) because the government satisfied the three conditions; the government's failure to obtain judicial approval *prior to* disclosure never entered the analysis. Accordingly, the Seventh Circuit effectively has rewritten § 2517(5) in contravention of it plain language and, in doing so, eliminated § 2517(5)'s key protection.

This Court should grant certiorari and review the Seventh Circuit's decision, particularly given the importance of strict compliance with Title III:

> The Act in Section 2515 condemned all wire or oral interceptions and prohibited their use in evidence where their disclosure was 'in violation of this Chapter.' Any exceptions from this broad language must be strictly construed to carry out the purpose of the Congress and make certain that the privacy of the individual is protected as so provided.

Brodson, 528 F.2d at 216.

There appears to be no split in the circuits on this question. However, the question is of such national importance given the privacy interests at stake, that this case merits review. Recently, this court noted that "the courts should intervene" when "[l]aw enforcement officials go too far" in their "quest for conviction." *Jacobson v. United States*, 112 S. Ct. 1535, 1543 (1992). Here, in a case involving a phony lawsuit filed by the FBI on behalf of fictitious parties and a government informant, the government went too far when it ignored the strict requirements of Title III. This Court should intervene.

II. This Court Should Grant the Writ on the Seventh Circuit's Federal Rule Of Evidence 404(b) Decision

A. Background Of Seventh Circuit's Federal Rule Of Evidence 404(b) Decision

Prior to trial, the government gave notice of its intent to introduce under Fed. R. Evid. 404(b) the testimony of convicted Cook County Judge Frank Salerno. R. 105. In essence, Salerno's testimony was that Shields' co-defendant, DeLeo, who was himself an attorney, paid Salerno bribes while he sat as a judge in Cook County Licensing Court. The government asserted that this evidence was relevant to show *DeLeo's* intent to bribe Shields. The district court granted defendants' motions *in limine* to preclude this evidence, holding that DeLeo had yet to put his own intent in issue and that Salerno's testimony therefore tended to prove only propensity and was more prejudicial than probative. R. 158.

Shortly after the trial began, the government moved to reconsider the order barring Salerno's testimony. The government argued that certain remarks made by DeLeo's counsel during his opening statement suggested an entrapment defense. The court in-

itially declined, but the government repeatedly begged the court to reconsider. Tr. 1245. Eventually, the court allowed the government to make a proffer of Salerno's testimony outside the presence of the jury but it again declined to admit the evidence. Tr. 1447-1528; R. 238.

Finally, upon receipt of a proposed jury instruction from DeLeo which indicated that one of DeLeo's theories of defense was that DeLeo "scammed" Cooley by keeping the bribe money instead of passing it to Shields, the district court decided to admit the Salerno testimony. Tr. 2833, 2884-89, 335. The district court reasoned that DeLeo had put his intent in issue through offering the "scamming" instruction and that the Salerno testimony therefore was admissible under Fed. R. Evid. 404(b) as evidence that DeLeo's intent was actually to pass on the bribe money to Shields. A-82; R. 264. The court allowed the evidence as "rebuttal," even though DeLeo failed to introduce any evidence in a defense case. In addition, although Salerno's testimony concerned only prior acts by DeLeo, the court denied Shields request for a limiting instruction providing that the jury could consider Salerno's testimony only as to DeLeo. Tr. 2967-68. Instead, the court instructed the jury that it could consider Salerno's testimony only on the issue of DeLeo's intent. Tr. 3004, 3133, 3806.

Salerno subsequently testified that DeLeo was among the most active lawyers in Licensing Court, appearing before Salerno regularly. DeLeo made monthly $50 or $100 payments to Salerno to guarantee favorable rulings. Tr. 3027-49. Initially, Salerno testified, DeLeo paid the bribes to the Assistant Corporation Counsel assigned to Licensing Court, identified only as "prosecutor A," who then passed the bribe money on to Salerno. Tr. 3034-36; 3039-40. Later, after "prosecutor A" had left Licensing Court due to illness, DeLeo made bribe payments directly to Salerno. Tr. 3040-42. The illicit relationship between Salerno and DeLeo finally ended in the Fall of 1984 amidst "a heavy investigation" by the government. Tr. 3029, 3047. At no point in his testimony did Salerno ever state or imply that DeLeo had acted as a middleman, passing on money from a third-party in exchange for rulings favorable to that third-party; instead, DeLeo was always the source of the bribe payments and those payments were made in exchange for favorable rulings

in *DeLeo's* cases. Tr. 3027-49. Indeed, DeLeo made the payments not for a specific result on a specific case, but as general "tribute" to ensure DeLeo's regular success in his frequent appearances on licensing matters.

B. The Seventh Circuit's Opinion Emasculates Rule 404(b)

Fed. R. Evid. 404(b) could not be more clear: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." As this Court long has recognized, Fed. R. Evid. 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." *Huddleston v. United States*, 485 U.S. 681, 687 (1988). In this case, the Seventh Circuit has promulgated a construction of Fed. R. Evid. 404(b) that flies in the face of both the plain language of the Rule and this Court's well established interpretation thereof. According to the Seventh Circuit, evidence of other acts is admissible to show that a defendant had the "ability, willingness and chutzpah" — i.e., the character — to commit the offense at issue. Because the Seventh Circuit's interpretation of Fed. R. Evid. 404(b) emasculates the Rule's prohibition on the admission of other acts evidence solely to establish a defendant's bad character, this Court should grant certiorari and reverse the Seventh Circuit's decision.

The Seventh Circuit's construction of Fed. R. Evid. 404(b) results from Shields' challenge to the admission of the Salerno testimony. Shields argued *inter alia* that DeLeo's prior bribery of Salerno was not sufficiently similar to DeLeo's alleged bribery of Shields to be relevant to DeLeo's intent with respect to Shields and did not prove *Shields'* intent.[2] While DeLeo paid bribes with his own money to Salerno, he was in this case the alleged "middleman" or conduit for bribes paid by Cooley. *Id.* Because DeLeo paid bribes to Salerno with *his* own money for favorable rulings on his *own* cases, his bribery of Salerno involved neither the obligation

---

2 Relying on this Court's decision in *Huddleston*, the Seventh Circuit requires that any party offering other acts evidence

to follow through on promises to a third party nor the temptation of illicit gain to test DeLeo's fidelity to those promises. Thus, Shields argued, the fact that DeLeo did in fact pass bribe money on to Salerno could in no way serve as a barometer of DeLeo's intent in this case, where DeLeo had received money from a third party (Cooley) and stood to gain by breaking his promise to Cooley and keeping the money rather than passing it on to Shields. Further, in no way could it be relevant to Shields' intent.

The Seventh Circuit rejected this argument:

> Shields next argues under Rule 404(b) that Deleo's bribes to Salerno were not sufficiently similar to his bribes to Shields to justify letting the jury hear about the earlier acts. The critical distinction, according to Shields, is that DeLeo bribed Salerno in his own cases instead of acting as a middleman, as he was charged with doing here. Yet DeLeo also acted as a middleman in his bribes to Salerno — the only and insignificant difference is that DeLeo bribed Salerno on his own client's behalf while he bribed Shields on Cooley's clients' behalf. *The information about DeLeo's behavior years earlier was relevant because it demonstrated he had the ability, willingness and chutzpah to bribe a judge.*

A-15; 999 F.2d at 1099 (emphasis added).

Even if the prior DeLeo/Salerno bribes were relevant to DeLeo's intent, DeLeo's intent of the time he took money from Cooley was not relevant to Shields' guilt or innocence. It lacked relevance to *Shields'* intent in meeting with DeLeo. The district court and Seventh Circuit never fully articulated the relevance to Shields. Thus, he jury received an inadequate limiting instruction and was free to consider the DeLeo evidence against Shields. This

---

2 satisfy a four factor test, one of the prongs of which is that "the evidence [must] show ... that the other act is similar enough and close enough in time to be relevant to the matter in issue." *United States v. Zapata*, 871 F.2d 616, 620 (7th Cir.1989).

evidence was devastating given that it tended to show that Shields' co-defendant was a briber of another judge.

The Seventh Circuit's interpretation of Rule 404(b) is indeed novel in that the Rule nowhere provides that other acts evidence is admissible if it "demonstrates [that the defendant] had the ability, willingness and chutzpah" to commit the offense at issue in the case. *Any* prior bad act — regardless of its relevance to a proper and enumerated purpose under Fed. R. Evid. 404(b) — proves that a defendant had the "ability, willingness and chutzpah" — i.e., the character — to commit a subsequent offense.[3] Thus, the inclusion of such language in the Rule would eviscerate any limitation therein on the introduction of other acts evidence as proof of a defendent's bad character.

The effect of the Seventh Circuit's decision in this case will be the removal, by judicial fiat, of any limitation on the introduction of prior bad acts evidence solely to establish a defendant's propensity to commit the offense at issue. Instead of having to demonstrate that the proffered prior acts are relevant to a proper purpose under the Rule, the offering party will need only to show that the prior acts prove that the defendant had the "ability, willingness and chutzpah" to commit the acts at issue — a showing the offeror will

---

3 Indeed, the Seventh Circuit itself has in other decisions recognized this basic truth:

> The implication was that a drug dealer is more likely than someone who is not a drug dealer to sell drugs, even if at a different level of distribution from his accustomed one. No doubt this is true. The inquiry [into previous criminal acts] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

United States v. Wright, 901 F.2d 68, 70 (7th Cir. 1990).

never fail to make. Moreover, it extends the rule to allow proof of a co-defendant's intent to be offered against a defendant — regardless of the irrelevance of the co-defendant's intent to the guilt or innocence of the defendant. This issue is of national significance given the increasingly prominent role that 404(b) evidence plays in criminal trials. A defendant has an absolute right to be judged on whether he committed the crime with which he has been charged rather than on whether he has associated with people who may have committed similar crimes.

In sum, to allow proof of a defendant's "intent" through evidence of a co-defendant's bad character would stand Rule 404(b) on its head and eviscerate the protections it provides. Accordingly, this court should consider this question.

CONCLUSION

For the reasons set forth above, petitioner David J. Shields respectfully requests that this Court grant certiorari, reverse the decision of the United States Court of Appeals for the Seventh Circuit in its entirety and order this case remanded to the district court for a new trial.

DATED: October 13, 1993

Respectfully submitted,
PETITIONER DAVID J. SHIELDS

Dan K. Webb
Steven F. Molo*
James F. Hurst
Timothy P. O'Connor
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel For Petitioner
David J. Shields

**Counsel Of Record*

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 92-1683 and 92-2237, consolidated

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID J. SHIELDS and PASQUALE F. DELEO,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 1044—**Ilana Diamond Rovner**, *Judge*.

ARGUED MARCH 30, 1993—DECIDED JULY 14, 1993

Before CUMMINGS and EASTERBROOK, *Circuit Judges*, and TIMBERS, *Senior Circuit Judge.**

CUMMINGS, *Circuit Judge*. A jury convicted David J. Shields, chief judge of the Chancery Division of the Circuit Court of Cook County, Illinois, of taking $5,000 or perhaps $6,000 from a lawyer named Pasquale F. DeLeo to fix a case. Shields was sentenced by Judge Rovner to thirty-seven months in prison plus three years of supervised release; DeLeo got a thirty-three-month sentence

---

* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

and two years of supervised release.[1] Shields' defense at trial, and the focus of his appeal to this Court, is that as a judge with twenty years' experience on the bench and an impeccable (until now) reputation, he simply made no deal and took no money. The whole enterprise, according to Shields, was a scam by DeLeo to extract money from another lawyer; Shields knew nothing about it. This other lawyer, it turned out, was a government informer.

We grant the validity of Shields' argument that the government's case lacks the kind of unassailable clarity one might wish to see in a prosecution of this sort: photographs of cash changing hands, tapes of co-conspirators talking about how they are going to spend the money, a parade of witnesses corroborating the illicit transaction. Nevertheless, the United States amassed a credible and coherent case against both defendants. Because we think the evidence was more than sufficient for a rational jury to conclude that Shields and DeLeo are guilty, and because their other legal arguments lack merit, we affirm their convictions.

The bribery investigation was originally targeted not at Shields but at another judge who was thought corrupt, or corruptible. Robert Cooley, a lawyer-turned-government-informer with longstanding involvement in Cook County graft and dishonesty, sought to fix a fictional case called *Nichols v. Wilson* in which Nichols claimed that his partner Wilson improperly took $350,000 in partnership funds. In his trial testimony, Cooley claimed to have bribed in his robust career at least twenty-nine Cook County judges as well as prosecutors, court clerks, police

[1] Shields was charged with and convicted of seven counts in violation of the Hobbs Act, 18 U.S.C. § 1951, the Travel Act, 18 U.S.C. § 1952, and for making false statements to federal agents under 18 U.S.C. § 1001. DeLeo was charged with and convicted of five counts in violation of the Hobbs Act and the Travel Act. Shields and DeLeo received sentences of 37 months and 33 months respectively for each count, but the judge ruled that they should serve the time concurrently.

officers, corporation counsels, state's attorneys, a police chief and a mayor before deciding on his own initiative—no investigation against him was pending at the time—to assist the FBI as an informer in ensnaring corrupt Chicago officials. In this sting operation Cooley represented the non-existent Nichols whose partner had absconded with the funds. After the case was randomly assigned to Shields, Cooley tried unsuccessfully to have it moved onto the docket of another judge. On August 16, 1988, Cooley asked DeLeo, his former law partner, to help him transfer *Nichols v. Wilson*, but DeLeo told him a transfer was not necessary because Shields could be bribed and that he, DeLeo, would do the bribing. This must have come as a surprise to Cooley because, according to his testimony, he thought Shields was honest and this view was confirmed by a well-known fixer, who told him he would not go near Shields "with a ten-foot pole" (joint supp. app. at D 28). As the defense points out repeatedly, Shields had a good reputation among Cook County judges; his only "indiscretion" was trying to talk his way out of a drunk-driving arrest by showing his judicial identification to the police. (In that instance he was cleared of judicial misconduct charges.) In any event, Cooley and DeLeo agreed to offer $2,500 to Shields to impose a temporary restraining order ("TRO") against make-believe-defendant Wilson to prohibit him from touching the contested partnership assets. This much neither DeLeo nor Shields disputes.

Shields, however, claims that DeLeo never meant to pass the money to the judge. The theory of his defense was that DeLeo knew upon hearing only a few sentences about *Nichols v. Wilson* that Cooley's client Nichols would win. Thus he made a quick calculation that he could assure Cooley of Shields' cooperation and pocket the money himself, secure in the knowledge that the judge would rule on his own initiative in Nichols' favor. With relatively minor exceptions, the rest of the facts in the case are not contested but take on opposite meanings depending on whether one believes the government or the defense. In

the view of the prosecution, subsequent events, including favorable rulings by Shields, are evidence that the judge was bribed. In the view of the defense, subsequent events prove only that DeLeo was especially clever in scamming Cooley, his former law partner.

Those events include a phone call in Cooley's car on August 17, 1988, the day after DeLeo first broached the subject of bribing Shields. The case was going to court in two days and the conspirators (in reality, one conspirator and one FBI informer) did not know whether Shields would be on the bench. DeLeo dialed Shields' office on Cooley's car phone. Cooley could hear the secretary answer on the speakerphone, then DeLeo picked up the receiver and had a conversation, purportedly with Shields, during which the deceitful lawyer arranged a meeting with the judge. According to the defense, DeLeo was faking the conversation—no one, or at least not Shields, was on the other end of the line. But the defense does not explain why DeLeo would have taken such a risk when he plainly did not have to.

DeLeo also did not take the $2,500 supplied by the FBI that Cooley offered him in the car but waited until the morning of the TRO hearing. The prosecution contends that if DeLeo had been conning Cooley, he would have taken the money at the first opportunity. To the defense, his reluctance was the work of a genius swindler, proving to Cooley that he had no personal interest in the money. On the morning of the TRO hearing, August 19, 1988, DeLeo took the cash from Cooley in a bathroom on the twenty-fourth floor of the Richard M. Daley Center in Chicago, then walked off in the direction of Shields' chambers. He did not enter, according to the FBI agents who were watching. DeLeo later told Cooley that he had seen the judge but that Shields didn't want the money until the case was over. The government explains this non-event—the failure of DeLeo to hand Shields money—as normal caution since even a crooked judge cannot afford to make blatantly lopsided rulings; thus the payoff was delayed until it was clear a favorable judg-

ment was possible. Money or no, Shields went to the bench that morning and granted the TRO Cooley wanted for his make-believe client.

DeLeo told Cooley later that he had managed to get the money to the judge. Cooley then said he wanted to convert the expiring TRO into a preliminary injunction and the two agreed to pay Shields another $2,500. DeLeo promised to talk to Shields before the next scheduled hearing—and he did. He waited for Shields in a City Hall corridor on August 30, 1988. The two shook hands and walked to the corner of Washington and LaSalle streets, where they stood talking for a couple minutes longer. The judge returned to his courtroom, called the lawyers into chambers to discuss settlement, and when the attorneys could not agree granted the preliminary injunction Cooley's client sought.

The defense claims that it was not unusual for DeLeo to have a conversation with Shields since the two had been casual acquaintances for ten years, and that they were not discussing *Nichols v. Wilson* but two other matters, including the reassignment of a divorce court judge who was a friend of DeLeo's, and the divorce of DeLeo's cousin, whom Shields knew slightly. After the August 30, 1988, hearing and settlement conference, DeLeo demonstrated knowledge in his discussions with Cooley that he could only have garnered by talking to the judge. For example, DeLeo knew that Shields would press the litigants to settle. It was quite reasonable, then, for the jury to conclude that Shields and DeLeo had discussed the case and, given the defense's theory, to deduce that they had schemed to resolve it in Cooley's client's favor.

Cooley gave DeLeo a second $2,500 on August 31, 1988, and DeLeo tried to see Shields that morning. The judge, however, was on the bench. Later DeLeo went to Shields' chambers carrying an accordion folder, inside of which was a large white envelope containing either the bribe (according to the prosecution) or pleadings in the divorce case of DeLeo's cousin (according to the defense). Since DeLeo

had no reason to believe Cooley was following him, these attempts to see Shields (after he told Cooley he would) do not comport with the defense's contention that DeLeo was merely pulling a fast one against his former law partner. The actual conversation between Shields and DeLeo, recorded by the FBI, was elliptical but included the damning statement, apparently by DeLeo, that it was "nice to have an inside track" (Shields' supp. app. at C 1).

The next hearing was scheduled for September 2, 1988. In the meantime, the fictional defendant Wilson in *Nichols v. Wilson* filed an emergency motion seeking the release of a portion of the frozen partnership funds. Cooley told DeLeo on the morning of the September 2 hearing that if Wilson's request could be delayed, Wilson would be forced into settlement on unfavorable terms with Cooley's client, Nichols. DeLeo went straight to Shields' chambers where he spoke with the judge in private. This in itself was rare because Shields did not often close the door to his office. Again, the FBI recorded the conversation but not very effectively; the two sides bitterly disputed what was said. According to the government, the conversation went like this—

> DeLeo: I'm going out of town next week. (inaudible) California (inaudible) stall [Wilson's motion] 'till next week and the case will be settled.
>
> Shields: Alright.

The defense's version is as follows:

> DeLeo: I am goin' outta town next week. (static) (inaudible) Be out there next week with (inaudible) California person. Wanted to come as far as next week is con-(inaudible).
>
> Shields or DeLeo: Bye.

(Shields' supp. app. at D 1). DeLeo's report to Cooley about the conversation matched the government's interpretation. He told Cooley that he said to Shields, "We want to stall it till next week," and Cooley said, "Fine, that's all we need" (joint supp. app. at H 8). Whatever

words were actually spoken between DeLeo and Shields, the judge did what DeLeo and Cooley wanted: he continued the case until the next week.

The case was dismissed by agreement of the fictional parties before any more hearings were held. Cooley later agreed to pay DeLeo $5,000 for his services. Cooley asked DeLeo if they should pay Shields more. Rather than answer affirmatively as might be expected were he keeping the money himself, DeLeo replied, "I don't think so." Cooley insisted on paying Shields another $1,000 in the event they should need his assistance again. Cooley spoke to DeLeo three more times and in each instance DeLeo said he had not yet delivered the additional money to the judge. FBI agents kept watch on the Daley Center until October 5, 1988, but DeLeo was not spotted. On October 3, 1988, two FBI agents questioned Judge Shields about *Nichols v. Wilson* in response to a (fictional) complaint by Wilson about how the case had been handled. Shields denied ever speaking about the matter with anyone except Cooley and an FBI agent, the lawyers in the fictitious case. The following June, six months after the FBI interview with Shields, DeLeo and Cooley met each other by happenstance at a restaurant. The conversation was recorded because Cooley was involved in another undercover case, and DeLeo told Cooley with startling precision just what questions the FBI had asked Shields.

The defense makes much of the fact that Shields' rulings in *Nichols v. Wilson* were legally correct. This misses two essential points. First and most obvious, issuing a judgment compelled or supported by law is no defense to taking a bribe. And since even parties with winning cases may benefit from fixing a case—by buying certainty of a favorable ruling—a legally correct decision conveys no useful information about the likelihood that the judge has been bribed. Second, several of Shields' rulings were clearly discretionary calls, such as granting a postponement to Nichols where delay meant Wilson was forced to settle on unfavorable terms. Every such discretionary ruling by Shields went in Cooley and DeLeo's favor. This

undercuts the position of the defense that DeLeo could have known how Shields would rule on every aspect of *Nichols v. Wilson*.

As we have often said before, the jury's verdict must be given credence unless the evidence, viewed in the light most favorable to the government, establishes that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Saunders*, 973 F.2d 1354, 1359 (7th Cir. 1992), certiorari denied, 113 S.Ct. 1026. Consider some of the evidence before the jury here. There were two recordings with the incriminating statements, "[it's] nice to have an inside track" and (according to the government's interpretation) "stall it till next week," with the judge replying to the latter statement, "alright." Nothing about the divorce case Shields claims he discussed with DeLeo appears on any recording. DeLeo also met privately with Shields precisely when he told Cooley he would, and DeLeo knew critical details of *Nichols v. Wilson*—and about the judge's interview with the FBI—that he could have learned only from Shields. Then there was the envelope delivered by DeLeo to Shields. The defense was left to argue that DeLeo would have been foolish to hand Shields money in a conspicuous large white envelope, but why a large envelope should be any more or less suspicious than a small envelope is unclear. If DeLeo were as clever as Shields claims, he would have known that a larger envelope would be easier to explain—it could contain, for example, pleadings from a divorce case, as the defense suggested at trial. Perhaps most damaging to Shields' defense, however, was the sheer unlikelihood of the theory that DeLeo would scam Cooley, his former law partner. The story hinges on DeLeo knowing instantly that Cooley's client would prevail on every aspect of the case. It also requires one to believe that DeLeo was willing to risk losing all credibility with Cooley should Shields issue a ruling unfavorable to his client, hardly a smart strategy for someone with long-range interests in the graft business. And it fails to explain why DeLeo was so resistent to taking more money

when Cooley was practically begging to give it to him. In short, a rational jury could (and did) convict Shields and DeLeo of fixing *Nichols v. Wilson*.

The defendants ask us to reverse their convictions on a slew of other grounds as well. Their joint brief claims that the indictment under which Shields and DeLeo were charged was faulty, that their convictions under the Hobbs Act, 18 U.S.C. § 1951, cannot stand because their actions did not affect commerce, and that the government improperly manufactured jurisdiction under the Travel Act, 18 U.S.C. § 1952.[2] We reject each argument.

---

[2] 18 U.S.C. § 1951 (Hobbs Act) says in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—***

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State, and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1952 (Travel Act) says in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(Footnote continued on following page)

The defendants would have us dismiss the indictment, and thus their convictions, because while the government's authorization to wiretap Shields' chambers focused only on Hobbs Act violations, prosecutors presented the grand jury with evidence relating to two other statutes as well: the Travel Act and the false statement act, 18 U.S.C. § 1001. Under 18 U.S.C. § 2517(3), the government may disclose the contents of authorized intercepted communications in sworn testimony before a legal proceeding. But since the government had not obtained authorization to wiretap for Travel Act and false statement violations, Shields claims the government breached 18 U.S.C. § 2517(5), which bans unauthorized use of intercepted communications.

This argument fails on several grounds. First, the defendants raised this issue in the district court and the government corrected any problem by obtaining a judicial order approving the release of information about Travel Act and false statement charges. It then voided the first indictment and took the case before a second and uninfected grand jury, which promptly indicted the defendants for violations of the two statutes in addition to the Hobbs Act. Thus the indictments under which Shields and DeLeo were convicted were not tainted. Second, it would have been impossible for the government to obtain authorization to wiretap based on false statement allegations because Shields was not suspected of this crime until after the wiretapping began; the false statements were made

---

[2] *continued*

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity means*** (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

by Shields to the FBI at the tail end of the case. Third, the Travel Act and false statement charges were based on the same set of facts as the Hobbs Act violation. Since the government was free to release this information to a grand jury anyway under the Hobbs Act authorization, it is difficult to see how the defendants were harmed when the same facts were presented in the context of different offenses. It is true that empaneling a second grand jury will not cure an indictment based on unauthorized wiretapping. In this case, however, the government's indiscretion was not unauthorized wiretapping—or in the language of *United States v. Arnold*, 773 F.2d 823, 829 (7th Cir. 1985), "subterfuge searches"—but the disclosure of what it learned. Defendants rely on *United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975). However, that case involved an indictment on different grounds entirely than the original authorization rather than, as here, additional grounds, and in *Brodson* the government waited to seek court authorization until eight months after it presented the information to a grand jury. *Id.* at 215. In *Arnold*, we held that belated approval would cure a defective original authorization if the original order was lawfully obtained, sought in good faith, and the questionable communication was incidentally intercepted during the course of a lawfully executed order. 773 F.2d at 829 (quoting S.Rep. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* 1968 U.S. Code Cong. & Ad.News, 2112, 2189. Each condition was met in this case.

The defendants next argue jointly, and DeLeo also argues in his individual brief, that their Hobbs Act convictions must be wiped away because all the money Cooley paid to Shields via DeLeo was provided by the FBI. To constitute an offense under the Hobbs Act, a deed must have an effect on interstate commerce. However, we have explicitly rejected the argument made by defendants here that where the FBI fronts the money in an extortion scheme, there is no influence on interstate commerce. *United States v. Hocking*, 860 F.2d 769, 777 (7th Cir. 1988), partially overruled on other grounds, *United States*

v. Levy, 955 F.2d 1093, 1103-1104 n.5 (7th Cir. 1992). That is because the Hobbs Act proscribes not just successful extortion schemes but "*attempts* to induce a victim engaged in interstate commerce to part with property." *United States v. Rindone*, 631 F.2d 491, 493 (7th Cir. 1980) (emphasis added). Thus one may be convicted of violating the Hobbs Act even though no money has changed hands. The government need only prove that there is a "realistic probability" of an effect on commerce. *United States v. Anderson*, 809 F.2d 1281, 1286 (7th Cir. 1987). Since the Supreme Court has interpreted the Hobbs Act to reach the limits of the Commerce Clause, *Stirone v. United States*, 361 U.S. 212, 215, the burden on the government is slight or *de minimis*. *Anderson*, 809 F.2d at 1286. In this case, the theory of the United States was that Shields' acceptance of bribes would have "depleted the assets" of Cooley's law firm, which regularly purchased items from states other than Illinois. See *United States v. Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985), certiorari denied, 475 U.S. 1012. Defendants argue that Cooley was a wealthy man who might lose hundreds of thousands each week gambling, but this is beside the point; one's assets are no less depleted by an extortion scheme merely because one has a lot of assets. It is true that Cooley's money was never at risk because the FBI was supplying the bribes, but as noted we rejected the same argument in *Hocking*, 860 F.2d at 777, a case not discussed by the defense. The cases cited by Shields and DeLeo, such as *United States v. DiCarlantonio*, 870 F.2d 1058 (6th Cir. 1989), certiorari denied, 493 U.S. 933, deal with substantive Hobbs Act violations rather than attempts and are inapplicable.

The last argument mounted jointly by the defendants alleges that the government improperly manufactured Travel Act jurisdiction. Before the August 30, 1988 hearing, Cooley attempted to postpone matters by saying that his client, Nichols, was in Seattle. DeLeo insisted that Cooley convince his client to return to Chicago for the hearing. This required that the undercover FBI agent who

was pretending to be Nichols travel to Chicago from his home in Phoenix. The defendants rely on *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), for the proposition that the government may not concoct jurisdiction by, for example, inducing a suspect to telephone a federal agent out of state where establishing a Travel Act violation is the only purpose of the call. But we seriously doubted the vitality of *Archer* in this (and other) circuit(s) in *United States v. Podolsky*, 798 F.2d 177, 181 (1986), in situations (like the instant case) where circumstances do not suggest entrapment and the supposed manufacture of jurisdiction does not cancel an element of the offense. We recently left open the possibility of an *Archer*-like claim in *United States v. Peters*, 952 F.2d 960, 963 (1992), certiorari denied, 112 S.Ct. 1277. However, in *Peters* we upheld a Travel Act conviction where a defendant merely drove a stolen truck to a drop-off point ten miles over the Indiana state line at the direction of FBI agents. Nothing about the fencing operation in *Peters* required that the stolen cars cross state lines except that the FBI's undercover agent was based there. In the instant case, the FBI agent was also based out of state; his participation was necessary because he had been involved in similar operations and because it was important to use an agent who would not be recognized in Chicago legal circles. Moreover, defendant DeLeo insisted to Cooley that Nichols return from his trip to attend the August 30 hearing. Thus unlike *Peters* where the FBI agents themselves orchestrated jurisdiction by instructing the defendant to cross the border, here it was DeLeo, without encouragement by FBI informants, who insisted that Cooley's client cross state lines.

Having rejected the arguments made jointly, we return to the contentions of the individual defendants. Shields, in addition to the sufficiency argument considered above, makes two claims worth discussing. The first is that Judge Rovner erred when she allowed the government to introduce the testimony of convicted Greylord Judge Frank Salerno, who claimed to have accepted bribes from defen-

dant DeLeo on a number of occasions. In the alternative, Shields argues that the district court should have given a limiting jury instruction or granted a severance based on the unfair prejudice of Salerno's testimony.

DeLeo began the trial with his counsel refusing to specify what his defense might be. Adopting Shields' version of events was problematic because convincing another person to give you money so that you can bribe a judge is illegal even if you intend to keep the money yourself. Yet DeLeo had few other defenses available to him; he could not and did not claim not to have taken money from Cooley, and entrapment was never at issue. The court initially excluded the Salerno testimony in an *in limine* ruling by noting that DeLeo had not put his intent in issue, but Judge Rovner warned DeLeo's counsel that if he mounted a "rainmaking" defense—i.e., if he claimed that he had conned Cooley and never tried to bribe Shields—she would reconsider her exclusion of the Salerno testimony. The colloquy about just what DeLeo's defense was continued throughout the trial until finally DeLeo submitted a jury instruction suggesting a rainmaking defense. True to her word, Judge Rovner then decided to allow Salerno to testify.

The test for admitting past act evidence under Federal Rule of Evidence 404(b) is whether:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

United States v. Zapata, 871 F.2d 616, 620 (7th Cir. 1989). Shields admits that the Salerno testimony was relevant, but argues that its admission violates the other three prongs of Rule 404(b). We disagree. Shields' contention

that DeLeo's intent was not at issue, only his conduct, flies in the face of our decision in *United States v. Tuchow*, 768 F.2d 855, 864 (1985). There the defendant in a bribery case also claimed to have kept the money himself. Such a rainmaking defense, we found, implicates intent because the defendant attempts to attach an innocent explanation to otherwise inculpatory behavior. In this case both defendants asked the jury to believe that DeLeo's actions toward Shields—handing the judge an envelope, talking to the judge behind closed doors, etc.—were innocent. DeLeo's intent either to bribe Shields or merely con Cooley was the central question of the case.

Shields next argues under Rule 404(b) that DeLeo's bribes to Salerno were not sufficiently similar to his bribes to Shields to justify letting the jury hear about the earlier acts. The critical distinction, according to Shields, is that DeLeo bribed Salerno in his own cases instead of acting as a middleman, as he was charged with doing here. Yet DeLeo also acted as a middleman in his bribes to Salerno—the only and insignificant difference is that DeLeo bribed Salerno on his own client's behalf while he bribed Shields on Cooley's clients' behalf. The information about DeLeo's behavior years earlier was relevant because it demonstrated he had the ability, willingness and chutzpah to bribe a judge.

Shields' last argument about the Salerno testimony is that the prejudicial effect outweighed the probative value. We accord a district court's determination of this question "special deference." *United States v. York*, 933 F.2d 1343, 1348 (7th Cir. 1991), certiorari denied, 112 S.Ct. 651. Judge Rovner's decision that the Salerno testimony was not overly prejudicial to Shields was correct for two reasons. First, the testimony was highly relevant because, as noted, Shields' own defense turned on DeLeo's intent. Second, Shields' claim that he was inordinately prejudiced by what Salerno said is not credible. Rule 404(b) is designed to prevent the admission of propensity evidence. Here the Salerno bribes reflected on the characters of Salerno and DeLeo, but they conveyed nothing at all

about Shields unless the jury concluded in a kind of throw-the-bums-out judgment that all Cook County judges were on the take. Salerno's testimony probably helped Shields as much as it harmed him because the Greylord judge also testified that, so far as he knew, Shields was honest. Shields' counsel even argued in closing that if Shields were corrupt, Salerno would have known about it. Because Shields was not significantly prejudiced by the Salerno testimony, Judge Rovner was correct in denying his motion for severance. As for her denial of a special jury instruction, the judge told jurors repeatedly and gave jurors an instruction to the effect that Salerno's testimony was relevant only to the issue of DeLeo's intent; that was sufficient.

In his individual brief, DeLeo makes the same argument about the Salerno testimony as does Shields, but with a twist. According to DeLeo, prosecutors "sandbagg[ed]" him by not objecting when he offered the rainmaking jury instruction which put his intent in issue and which triggered Judge Rovner's decision to admit the Salerno testimony. The government exacerbated the treachery, in DeLeo's view, by arguing in closing that the rainmaking defense, even if believed, would not excuse DeLeo from liability. DeLeo offers no case authority for the dubious proposition that prosecutors were obliged to object to DeLeo's counsel shooting his client in the foot by putting intent in issue. Judge Rovner warned DeLeo in the earliest stages of the trial that she would admit Salerno's testimony if DeLeo opened the door to intent by asserting a rainmaking defense. It is also rather incredible for DeLeo now to claim his trial counsel was unaware that taking money under the pretense of bribing a judge is against the law. One would be hard-pressed to imagine a more elementary judgment an attorney would have to make about his client's case.

Shields' final argument meriting discussion concerns the testimony of FBI informer Cooley and the district court's decision to allow the prosecution to explore his lengthy involvement in Cook County graft on direct examination.

According to Shields, the government's questioning of Cooley was a guise for putting improper testimony before the jury. Yet the state may impeach its own witness to lessen the blow of cross-examination; this is the most basic trial strategy. *United States v. LeFevour*, 798 F.2d 977, 983 (7th Cir. 1986). It is true that impeachment of one's own witness is not permissible if the questioning is a means of subterfuge to expose the jury to otherwise inadmissible evidence. *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984). But in this instance there is little doubt that Cooley's roguish past would have come out on cross-examination; as early as opening statements, Shields' attorney called Cooley an "evil, corrupt lawyer." Thus the government had a legitimate reason to explore the subject on direct examination.

Finally, DeLeo in his individual brief claims that he should have been granted a severance because Shields' trial strategy was to dump the blame on him. The failure of logic in this argument is that Shields' defense could not have been antagonistic to DeLeo's defense as is required under *United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990), since the two defenses were identical.

We reject all other arguments made by defendants, and for the reasons stated above the convictions of Shields and DeLeo are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—7-14-93

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 90 CR 1044
v.	)	
	)	Hon. Ilana D. Rovner
DAVID J. SHIELDS and	)	
PASQUALE F. DELEO,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The government alleges in this criminal prosecution that defendant David J. Shields, formerly the Chief Judge of the Chancery Division of the Circuit Court of Cook County, Illinois, accepted bribes from his co-defendant, Pasquale F. DeLeo, an attorney, in exchange for favorable treatment in a case pending before Shields. That case, as it turns out, was one of a series of mock cases filed by federal agents investigating corruption in the Illinois courts. Much of the evidence against both Shields and DeLeo was obtained by the government by means of electronic monitoring equipment which it installed in Shields' chambers pursuant to an order issued by then acting Chief Judge James B. Moran on August 29, 1988. Shields has moved to suppress the evidence obtained through electronic surveillance and to dismiss the superseding indictment, contending, *inter alia*, that authorization for the surveillance was based

upon materially false information which the government had submitted in support of its application to bug Shields' chambers. For the reasons set forth below, Shields' motions to suppress and dismiss are denied.[1]

II. FACTS

The fictional lawsuit which the government used as the vehicle for its undercover investigation was filed in the chancery Division of the Circuit Court of Cook County, Illinois, on July 12, 1988. The case, *Nichols v. Wilson*, Case No. 88 CH 6337, was assigned by lot to Shields. (*See* Indictment ¶1(e).) Robert J. Cooley, an attorney cooperating with the Federal Bureau of Investigation ("FBI"), assumed the role of the plaintiff's attorney in this contrived suit. Beginning just prior to the date the *Nichols* case was filed and continuing through the months of July and August, 1988, Cooley allegedly engaged in a series of conversations with Patrick Marcy, secretary of Chicago's First Ward Democratic Organization and defendant DeLeo about the possibility of either persuading Shields to rule favorably to Cooley's fictitious client or having the case assigned to another judge who could be so persuaded. These conversations were consensually monitored by means of a body recording device attached to Cooley's person. Based upon the evidence which it gathered through Cooley in the months of July and August, the government on August 29, 1988, submitted an application to Judge Moran for permission to intercept oral conversations from Shields' chambers pursuant to the provisions of the federal wiretapping statute, 18 U.S.C. §2518.

---

1 DeLeo has filed a brief motion broadly invoking many of the same arguments Shields has raised in his own motions to suppress and dismiss. Because DeLeo does not raise any arguments different from those Shields has articulated, there is no need to address DeLeo's motion independently. The Court denies his motion on the same grounds that it denies Shields' motions.

The government submitted the 17-page affidavit of FBI Special Agent John S. Bowen in support of its application. According to the affidavit, Bowen had been detailed to the Chicago field office of the FBI for the prior four years, and during that time had been assigned to investigate judicial corruption exclusively. (Bowen Aff. ¶3.) In his affidavit, Bowen laid out the background of the government's ongoing investigation in connection with the *Nichols* suit, and detailed the evidence which the government had gathered to date through Cooley.

Many of the particular representations that Bowen made in his affidavit have been set forth in detail below; consequently, a lengthy summary is not required here. Briefly, Bowen asserted that although Marcy ultimately had been unable to offer Cooley any assistance in securing a favorable disposition of the *Nichols* suit, DeLeo had represented to Cooley on August 16, 1988, that he could arrange to fix the case by passing along money to Shields. (Bowen Aff. ¶8D.) According to the affidavit, Cooley and DeLeo had agreed upon a figure of $2,500 to be paid to Shields in exchange for a favorable ruling upon a motion for an injunction that Cooley intended to bring in the immediate future. (*Id.*)[2] Bowen further represents that Cooley and DeLeo met the following day, at which time DeLeo scheduled a meeting with Shields on the morning of August 19, 1988, prior to the hearing which had been set for later that morning on Cooley's motion for a temporary restraining order in the *Nichols* case. (*Id.* ¶8E.)

---

2 Bowen's affidavit reveals that the fictional parties to the *Nichols v. Wilson* suit were partners in a financial management firm. (Bowen Aff. ¶8A.) According to the complaint filed in the case, the defendant (Wilson) had improperly withdrawn $350,000 from partnership funds and deposited them in his own account. (*Id.*) The complaint sought ultimate relief in the form of an order requiring defendant to return these funds, and interim relief in the form of an injunction preventing the defendant from moving the funds from the personal account to which he had deposited them. (*Id.*)

The hearing allegedly went forward on August 19. According to Bowen, Cooley met with DeLeo that morning outside Shields' courtroom and at DeLeo's request paid him $2,500 on the representation that DeLeo would take it to Shields. (Bowen Aff. ¶8F.) DeLeo then allegedly left Cooley and walked through the courtroom toward the hallway leading to Shields' chambers. (*Id.*) He allegedly returned moments later, informing Cooley that Shields would not accept the money until after he had ruled upon Cooley's motion. (*Id.*) According to Bowen, an *ex parte* hearing on Cooley's motion subsequently went forward before Shields, who granted the request for a temporary restraining order. (*Id.*) By its terms, the order purportedly would expire on August 29, 1988. (*Id.*)

According to Bowen's affidavit, Cooley and DeLeo met again on August 24, 1988. (Bowen Aff. ¶8G.) At that time, Bowen represented, the two discussed Cooley's intention to appear before Shields on August 29 and request a continuance of the temporary restraining order. (*Id.*) DeLeo purportedly encouraged Cooley to have his client present, assuring Cooley that he would make sure Shields ruled in Cooley's favor. (*Id.*) Bowen further represented that DeLeo instructed Cooley to call him on the morning of August 29, 1988, and indicated that he would arrange to meet with Shields prior to the hearing that day. (*Id.*) According to Bowen, DeLeo indicated to Cooley that Shields was content with the $2,500 he had been paid, and recommended that Shields be paid an additional "two bits," which Cooley took to mean another $2,500. (*Id.*)

Bowen's affidavit reports that Cooley appeared before Shields on August 29, 1988, in the *Nichols* case, and at that time a representative of the fictional defendant requested a continuance until the following day. (Bowen Aff. ¶8I.) Shields allegedly granted the request. (*Id.*) Cooley and DeLeo spoke later that day, according to Bowen, and DeLeo indicated he would see Shields prior to the time Cooley was due back in court on the following day. (*Id.*) Cooley intended to present a request to extend the temporary restraining order when he next appeared before Shields, Bowen represents; and Cooley planned to meet with DeLeo beforehand and pay him $2,500 in exchange for a favorable ruling on the request. (*Id.*)

Having set forth these factual assertions, Bowen stated his belief that conversations would occur between Shields and DeLeo in Shields' chambers on August 30, 1988, prior to the scheduled hearing in the *Nichols* case that day. (Bowen Aff. ¶8I.) Bowen anticipated that the two men would discuss the disposition Cooley wanted as well as the money received from Cooley, and that DeLeo would deliver the bribe to Shields at that time. (*Id.*)

On the evening of August 29, 1988, Judge Moran granted the government's application for leave to begin monitoring oral conversations within Shields' chambers. The authorization order which Judge Moran signed reflected his findings that there was probable cause to believe that: (1) Shields and DeLeo had committed and were committing offenses involving the interference with commerce by extortion and the conspiracy to do so, in violation of 18 U.S.C. §1951, and racketeering, in violation of 18 U.S.C. §1962; (2) oral communications concerning these offenses, in particular communications regarding the solicitation and receipt of bribes to influence the handling of civil cases pending in the Circuit Court of Cook County, Chancery Division, would be intercepted from Shields' chambers; and (3) Shields' chambers had been and were being used by defendants in connection with these offenses. (Aug. 29, 1988 Order Authorizing Interception of Oral Communications at 1-2, ¶¶A, B, D.) Judge Moran also found that "[n]ormal investigative procedures have been tried and failed to achieve all of the objectives of the investigation, reasonably appear unlikely to succeed if continued, or are too dangerous." (*Id.* at 2, ¶C.)

III. ANALYSIS

A. Legal Standards

Shields and DeLeo have filed their motions to suppress pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq.*, and *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 1674 (1978). Defendants contend that the affidavit which the government submitted in support of its application to conduct electronic surveillance of Shields'

chambers contained material misstatements and omissions, and that absent these misrepresentations and omissions, probable cause to support the surveillance was lacking. *See generally id.* at 155-56, 98 S. Ct. at 2676.

The Supreme Court's opinion in *Franks* sets forth the general framework governing a Fourth Amendment challenge to the validity of a search warrant which the defendant contends was issued on the basis of factual misrepresentations:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to a finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56, 98 S. Ct. at 2676. *See also United States v. McNeese*, 901 F.2d 585, 593-94 (7th Cir. 1990). Omissions from the affidavit are evaluated on the same basis. *Id.* at 594. Thus:

> The omission of a fact from an affidavit is material only if it amounts to deliberate falsehood or reckless disregard for the truth. Mere negligence by the affiant does not constitute reckless disregard for the truth. Nor is an omission material if, in context, the information was of such minimal significance that its omission could not reasonably have affected the magistrate's (or the judge's) judgment in finding probable cause to search.

Id. (citations omitted). The Seventh Circuit has applied this same framework to motions to suppress the fruits of electronic surveillance authorized under Title III. *See United States v. Williams*, 737 F.2d 594, 602 & n.5, 604 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003, 105 S. Ct. 1354 (1985).

Within this framework, the defendant's initial burden is to make a "substantial preliminary showing" that the affidavit submitted in support of the government's warrant application was materially misleading. *See* 438 U.S. at 155, 98 S. Ct. at 2676. As the Supreme Court stressed in *Franks*, this burden is not minimal:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

438 U.S. at 171, 98 S. Ct. at 2684. *See also McNeese*, 901 F.2d at 594 ("[defendant] must offer direct evidence of the affiant's state of mind or inferential evidence that the affiant had obvious reasons for omitting facts in order to prove deliberate falsehood or reckless disregard"). Moreover, even where the defendant has succeeded in proffering evidence which substantiates his contention that the affidavit contained deliberate misrepresentations or omissions, the Court need not invariably grant the defendant an evidentiary hearing on the motion to suppress. Rather, the misstatements or omissions must be material; that is, they must have been necessary to the finding of probable cause underlying the warrant.

> A substantial preliminary showing that the affidavit contained reckless or deliberate falsities and omissions must be followed by a substantial showing that the affidavit purged of those falsities and supplemented by the omissions would not be sufficient to support a finding of probable cause.

Id. at 596, citing *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684. *See also id.* at 156, 98 S. Ct. at 2676; *United States v. Muhammad*, 928 F.2d 1461, 1464-65 (7th Cir. 1991).

Having reviewed defendants' motions as well as Agent Bowen's affidavit with these requirements in mind, the Court finds that Shields has not made a substantial showing sufficient to require a *Franks* hearing. As set forth below, the most Shields is able to demonstrate is that in certain instances, Bowen made representations which were mistaken. Even this conclusion, however, requires one to indulge Shields in certain assumptions. More importantly, Shields has come forward with no evidence tending to show that the purported inaccuracies amounted to deliberate or reckless misrepresentations on Bowen's part. To the extent there are any discrepancies in Bowen's affidavit, they are not of such magnitude that they give rise to an inference of a disregard for the truth, nor has Shields submitted any additional evidence from which such an inference could be drawn. In sum, the most one can glean from Shields' objections is a showing of minor negligence in certain isolated instances. This falls far short of what is required in order to merit a *Franks* hearing. *See* 438 U.S. at 171, 98 S. Ct. at 2684; *McNeese*, 901 F.2d at 594.[3]

---

3 In essence, the challenge Shields mounts to Bowen's affidavit represents an attempt to hide the forest by magnifying its individual trees. This approach to probable cause determinations is inconsistent with the standard of review set forth in *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332 (1983). *Cf. United States v. Leisure*, 844 F.2d 1347, 1354 (8th Cir.) ("Appellants engage in a 'divide and conquer' attack on the affidavit, and urge this court to undertake a piecemeal dismemberment of the various paragraphs of the affidavit without attention to its force as a whole. We decline this

However, even if the Court were to assume that defendants had succeeded in establishing that Agent Bowen's affidavit did contain deliberate false statements or omissions, it nonetheless would conclude that these statements or omissions, taken either individually or together, are immaterial. In other words, the Court finds that stripped of the purported misstatements and supplied with the purported omissions, the Bowen affidavit would nonetheless have been sufficient to supply probable cause for the electronic surveillance in this case. *See Franks*, 438 U.S. at 171-72, *McNeese*, 901 F.2d at 594. The Court's findings as to each of the asserted misrepresentations and omissions are set forth below. In addressing in detail each of the many objections Shields has made to the affidavit, the Court does not mean to suggest that it entertains any doubt that the affidavit, viewed as a whole, amply supports Judge Moran's determination of probable cause. *See* n.3, *supra*. Rather, the Court has undertaken a thorough review of Shields' objections merely in order to afford the defendants the benefit of every reasonable doubt. *But see Muhammad*, 928 F.2d at 1465 (doubtful cases should be resolved in favor of upholding warrant).

B. Purported Misrepresentations and Omissions

1. Shields' purported satisfaction with money

Shields initially attacks Paragraph 8G of Bowen's affidavit, contending that it "sets forth a blatant misrepresentation on perhaps the most crucial point in the affidavit — that DeLeo allegedly had personal knowledge that Shields took a bribe to fix the *Nichols*

---

invitation to review the affidavit in an overly stringent and hypertechnical fashion."), *cert. denied*, 488 U.S. 932, 109 S. Ct. 324 (1988); *United States v. Reivich*, 793 F.2d 957, 960 (8th Cir. 1986) ("Such emphases typify the 'excessively technical dissection of informants' tips' and the "judging [of] bits and pieces of information in isolation against artificial standards' against which the Supreme Court cautioned in Gates and [*Massachusetts v. Upton*, 466 U.S. 727, 732, 104 S. Ct. 2085, 2088 (1984)].").

case and was satisfied with the amount of the bribe." (App. at 2.)[4] In full, Paragraph 8G states:

> On August 24, 1988, CW had a consensually monitored conversation with DeLeo. DeLeo recommended that CW have his client in court on August 29, 1988, when CW would be seeking an extension of the temporary restraining order. DeLeo said that if CW had his client there, he (DeLeo) would make sure that Judge Shields ruled in CW's favor. DeLeo also told CW to call him at 9:00 a.m. on August 29, 1988 and DeLeo would go to see the judge before the 11:00 a.m. hearing. *DeLeo also indicated that the judge was satisfied with the $2,500 paid on August 19, 1988.* DeLeo also recommended that the judge be paid an additional "2 bits" (believed by CW to mean $2,500) for any subsequent action taken by the judge. Based upon these statements, affiant believes DeLeo paid the bribe money to Shields sometime between August 19, 1988 and August 24, 1988.

(Emphasis supplied.) According to Shields, the representation that DeLeo had told Cooley that Shields was satisfied with the $2,500 he had received was an outright fabrication. In Shields' view, this was a misrepresentation which was critical to the success of the government's application to bug Shields' chambers, for it was offered to establish DeLeo's personal knowledge that Shields had accepted a bribe. Stripped of this misrepresentation, Shields contends, the Bowen affidavit contains nothing more than evidence of "boasting and larceny by trick on the part of DeLeo"; and without it, Shields further asserts, Judge Moran would not have granted the government's Title III application. (App. at 4.)

---

4 Shields has submitted a memorandum of law in support of his motion to suppress; attached to the memorandum as an appendix is an offer of proof outlining in greater detail his objections to individual statements and purported omissions in Bowen's affidavit. The Court has cited to the memorandum as "Mem. at ____," and to the offer of proof as "App. at ____."

In response, the government contends that Bowen's statement was a completely accurate representation of what Cooley had told him. Thus, after Bowen discussed the August 24 meeting with Cooley, he wrote in an FBI 302 that "Smith [Cooley] advised that DeLeo also indicated that the Judge was satisfied with the last $2,500 payoff." (Bowen 302, dictated Aug. 24, 1988/transcribed Aug. 31, 1988.)[5] Because the "last $2,500 payoff" as of the August 24 meeting was the one Cooley had [allegedly] made on August 19, 1988, the government contends, Bowen's affidavit was true to what Cooley had recounted of his conversation with DeLeo. (Gov. Mem. at 36.) The only basis for Shields' argument to the contrary, the government further argues, lies in the transcript of this conversation. The initial draft of this transcript reported the following exchange:

> COOLEY: Alright, but I mean, with him, was he happy with what I gave him before.
>
> DELEO: Yeah
>
> COOLEY: Ok, as long as he's happy that's the, you know the main thing.

(Draft Transcript at 4, Tape No. 170, Aug. 24, 1988.)[6] Shields maintains that the word "Yeah" cannot be heard on the tape. The

---

5 As the government notes, the Court may consider the content of the 302 forms in determining whether a *Franks* hearing is necessary. *See United States v. Costello*, 610 F. Supp. 1450, 1460-64 (N.D. Ill. 1985) (Roszkowski, J.), *aff'd without published opinion*, 830 F.2d 195 (7th Cir. 1987) (considering content of 302s in ruling upon motion to suppress evidence obtained through electronic monitoring of judge's chambers in Operation Greylord prosecution). Shields has cited each of the 302s referred to in this opinion as evidence he would present at an evidentiary hearing regarding the accuracy of Bowen's affidavit.

6 In instances where the Court has quoted from the transcripts, it has endeavored to make the quotes verbatim. Because the transcripts are replete with errors of punctuation and grammar,

government concedes that point and has revised the transcript to indicate that DeLeo gave no response which is audible on the tape. But the dispute about the accuracy of the transcript has nothing to do with the accuracy of Bowen's affidavit, the government maintains. The transcript had not been prepared at the time Bowen's affidavit was executed, and the affidavit does not purport to quote DeLeo as if the transcript had been prepared. (Gov. Mem. at 37.) Finally, the government maintains that to the extent that the revised transcript indicates that DeLeo made no audible response to Cooley's inquiry regarding the judge's satisfaction with the money previously paid to him, it does not call the veracity of Bowen's affidavit into question. According to the government, Cooley never stated nor did Bowen represent, that DeLeo had orally confirmed Shields' contentment with the payoff; the affidavit simply states that DeLeo had "indicated" Shields was satisfied. (Gov. Mem. at 37-38.) Moreover, assuming that Cooley had reported to Bowen that DeLeo had given an oral response to his question, it would not have been improper for Bowen to rely upon that report and so represent in his affidavit. (*Id.* at 38, citing *United States v. McDonald*, 723 F.2d 1288, 1293 (7th Cir. 1983), *cert. denied*, 466 U.S. 977, 104 S. Ct. 2360 (1984).)

Having reviewed Bowen's affidavit, his form 302 summary of Cooley's account of the August 24 encounter with DeLeo, and both the tape and transcripts of this encounter, the Court agrees that Shields has made no showing of a reckless or deliberate falsity which would entitle him to an evidentiary hearing. Bowen's representation that "DeLeo also indicated that the judge was satisfied with the $2,500 paid on August 19, 1988" does not depart in any manner from the 302 summary Bowen prepared after debriefing Cooley. Thus, assuming the accuracy of the 302, there is no suggestion that Bowen misrepresented the version of the conversation that Cooley had given him. Nor does the tape recording of the conversation between DeLeo and Cooley suggest that Cooley, let alone Bowen, had misrepresented the import of the exchange between the two. Having listened to the recording, the Court agrees that one cannot discern from it an audible response to Cooley's question about Shields' satisfaction. However, given the imperfec-

---

these errors will reappear here.

tions of body recording devices and the occasionally transient quality of the recordings, the inability to hear a response on the tape does not exclude the possibility than a faint oral response not picked up by the recording device was nonetheless given; nor does it exclude the possibility that DeLeo may have answered the inquiry with a some fonn of nonverbal response.[7] Indeed, the context of the conversation suggests that DeLeo did give some sort of affirmative response. Thus Cooley goes on to remark (without subsequent correction or contradiction from DeLeo), "Ok, as long as he's happy . . . ." Of course, it remains for the jury to decide, after hearing both Cooley's testimony about the conversation and the recording of it, what DeLeo actually indicated to Cooley. However, the record as it now stands suggests that Bowen's summary of the August 24 exchange between DeLeo and Cooley was entirely faithful to what transpired. Furthermore, Shields has brought forward no evidence which suggests that Bowen recklessly or deliberately misrepresented the conversation.

2. DeLeo's statement to Cooley suggesting Shields was corrupt

Shields' next objection focuses upon Paragraph 8D of Bowen's affidavit. In relevant part, that paragraph states:

> On August 16, 1988, the CW engaged in a consensually monitored conversation with DeLeo at which time DeLeo clearly stated, after being told that the case was assigned to Judge David J. Shields, that he could assist in fixing the case. DeLeo indicated that "*the judge will do whatever you want, is getting the money.*"

(Emphasis supplied.) Shields contends that the quote is a fabrication, employed by Bowen in order to suggest that DeLeo knew, presumably from past experience, that Shields would accept bribes. (App. at 5.)

---

7 Shields' challenge to this aspect of the affidavit is based solely upon the lack of an audible response on the tape to Cooley's inquiry regarding the previous payment. Shields does not contend that DeLeo failed to respond in some other, nonverbal way to the question. (*See* App. at 3-4.)

In response, the government terms this objection as "the case of the out-of-place quotation mark." (Gov. Mem. at 38.) The government concedes that DeLeo did not use the word "money" when he was describing to Cooley what it was that Shields purportedly cared about. (*See id.* at 40.) Indeed, as the transcript of the conversation referred to in this paragraph reflects, and as the Court's own review of the tape recording of the conversation confirms, what DeLeo and Cooley appear to have said to one another is as follows[8]:

DELEO: Okay lets do this. I'll tell you the best way with Dave, okay? What's the first step? The first step is to get the injunction right?

COOLEY: Well we want, I wanna make sure though, I wanna make sure Pat if I do something. In other words I don't wanna do something before this guy and get started and you can't move the case. I think, I think anytime.

DELEO: *No, he' ll do whatever we want. all he' s wan . . . worried about is this.* That's what I'm saying and you know and you, you know how, what to do.

COOLEY: Okay.

---

8 :For purposes of the pending motions to suppress, the Court has assumed that the tape recordings are authentic, and that the speakers have been accurately identified by the government in the transcripts which it has prepared. Ultimately of course, these are matters for the jury to decide, and the Court does not undertake to make any findings here upon such questions. Beyond certain specific objections as to the accuracy of the transcripts, however, the defendants have not raised any general challenges to the authenticity of either the transcripts or the tape recordings, nor have they contended that the Court may not assume that the speakers have been correctly identified.

(Transcript at 3-4, Tape No. 163, Aug. 16, 1988.) (Emphasis supplied.) Bowen was plainly aware that DeLeo had not used the word "money" in this exchange, for in the Form 302 summary he prepared regarding this conversation, he wrote:

> DELEO told SMITH[9] [COOLEY] that "The judge will do whatever you want, all he is worried about is getting the money." SMITH stated that DELEO did not utter the word "money" but instead indicated the judge's concern about the money by making the hand motion of rubbing his fingers together.

(Bowen 302, dictated Aug. 18, 1988, Transcribed Aug. 25, 1988.) However, the government argues that the inaccuracy is limited to one word ("money"), a word which accurately reflects the tenor of what DeLeo actually said ("this") and did (rubbed his fingers together). Shields offers no alternate construction of DeLeo's statement and gesture, the government observes[10]; moreover, in its own view, the notion that DeLeo was talking about money is confirmed by the remainder of the conversation:

> DELEO: Tell me what the first step is to get the injunction.
>
> That'll lock up the money.
>
> COOLEY: That's the first thing you wanna do right?
>
> DELEO: (IA). I'll approach him and ask him, Judge here I got this case you know, we're getting into it. It's very important ah, here's what I wanna do. The first thing I wanna do is lock up the money by getting an injunction.

---

9 The government's Form 302s identify Cooley as "ERIC SMITH".

10 Shields does not dispute the government's representation, based upon Bowen's 302, that DeLeo had made the gesture with his fingers.

COOLEY: Once we do that we're, I think we're basically home free.

DELEO: And then right then and there I'll take care of him on that.

COOLEY: Okay.

. . .

DELEO: Yeah what is, the first step is to get the injunction. You want me to talk to him first.

COOLEY: Yeah definitely. I, I wanna make sure.

DELEO: (IA) write (IA).

COOLEY: I wanna make sure that he doesn't play games. I wanna make sure that you know I don't go in/there and have him hem or haw or Hedge.

DELEO: No he won't play games.

COOLEY: Because the moment we do it this guy will glam with the money.

DELEO: You just tell me what you want to do with it.

COOLEY: Well the main thing is to get an injunction. . . . .

. . .

DELEO: Just got to motion it up.

COOLEY: We motion it up? Well let me see whats what then and ah, ah I'll give you a call and . . . alright.

DELEO: But all you got to do is tell me what you want me to give him

COOLEY: Alright you tell me whats fair.

DELEO: I don't know.

COOLEY: Yeah.

DELEO: I know. You know all I want to do, all I want to do is lock him up.

COOLEY: Theres big bucks involved in it.

DELEO: You tell me what you want to do.

COOLEY: Theres big bucks involved.

DELEO: You tell me what you wanna do.

COOLEY: Well you tell me whatever is fair to start.

DELEO: I don't care. It don't make any difference.

COOLEY: Alright give me a normal number.

DELEO: I have no idea.

COOLEY: I've never done anything before in the civil area.

DELEO: I have no idea.

COOLEY: So numbers I, I don't care what the numbers are. You know if it's worthwhile.

DELEO: I don't know.

COOLEY: If I, if I can walk in and look at the star.

DELEO: He'll do it, he'll do it like this.

COOLEY: Okay.

DELEO: Okay. He'll do anything. You tell me what you want me to give him.

COOLEY: How about, how about 2500?

DELEO: Fine.

COOLEY: Alright? Then let me get the motion ready to go in. I'll see you in a day or two and I'll get you then.

DELEO: (IA)

COOLEY: Okay?

DELEO: Okay. No problem.

. . .

(Transcript at 4-9.) The government maintains that DeLeo's use of phrases such as "I'll take care of him" and "all you got to do is tell me what you want me to give him" in this portion of the conversation makes clear that Cooley and DeLeo are talking about money, and thus corroborates the construction Cooley and Bowen had given to DeLeo's earlier statement that "all he cares about is this." What Shields' objection boils down to, the government argues, is that Bowen used quotation marks when he should not have; but the misplaced quotes did not distort the import of DeLeo's remark, nor would the affidavit in its corrected form have been any different substantively.

Bowen's affidavit is misleading to the extent the quotation marks suggest DeLeo actually used the word "money" when telling Cooley what it was Shields purportedly cared about. Yet, the Court finds it significant that Bowen used the word "indicated" in recounting DeLeo's statement. (*See* Bowen Aff. ¶8D.) One might reasonably conclude from Bowen's use of that word that his summary of DeLeo's statement to Cooley was merely meant to be an approximation, not an exact quote. That point aside, having reviewed the transcript of the entire conversation and listened to the recording, and taking into account Bowen's 302 summary of what Cooley reported from the conversation, the Court finds any discrepancy from DeLeo's actual statement to be minimal. Shields does not dispute that but for the word "money," Bowen's description of DeLeo's remark is accurate, nor, as the government has pointed out, does Shields suggest that DeLeo meant something other than "money" when he used the word "this" and rubbed his fingers together. Thus, but for Bowen's erroneous use of the quo-

tation marks, the affidavit is true to the information set forth in the 302 summary.

Moreover, a reasonable interpretation of the subsequent exchange between Cooley and DeLeo is that the two were discussing how much money should be given to Shields. In this context, although Bowen's affidavit may have misquoted DeLeo, it does not distort the apparent meaning of DeLeo's remark. Indeed, assuming the affidavit had been correctly phrased or punctuated, it would have conveyed the same information to Judge Moran. In other words, the Court finds the deviation between the account of the conversation which Cooley had given to Bowen and Bowen's affidavit in this instance so slight as to have been immaterial. At the same time, the circumstances reflect no evidence that Bowen's summary of the conversation amounted to a reckless or deliberate misrepresentation of fact.

3. Relevancy of DeLeo's alleged prior corrupt dealings with Patrick Marcy

In Paragraph 6B of his affidavit, Bowen summarizes prior instances in which Cooley allegedly had bribed members of the judiciary at the behest of Patrick Marcy[11]:

> Prior to cooperating with the government, CW fixed a number of cases at the request of Marcy. One case involved a murder committed by Harry Aleman in approximately 1977. CW paid Cook County Circuit Court Judge Frank Wilson $10,000 in order to fix the case. CW obtained the money from Pat Marcy. Aleman was found not guilty by Wilson in a bench trial. Another case involved a murder involving members of a Chinese organization known as the On Leong. CW served as courier for bribe money from New York members of the On Leong to Marcy and Chicago First Ward Alderman Fred Roti. A third case, in 1985,

---

11 Marcy is named as a defendant in a separate indictment pending before Judge Marvin E. Aspen of this district. *United States v. Marcy*, Case No. 90 CR 1045.

> involved an attempted murder charge against a defendant named Michael Collella. The victim was a Chicago police officer. While CW was attempting to negotiate a plea in the case, Marcy contacted CW and told him to try the case because it had "already been taken care of." The defendant was subsequently acquitted in a bench trial before Cook County Circuit Court Judge Lawrence Passarella.

Shields contends that this information is completely irrelevant to the question of whether or not Shields was corrupt and was likely to discuss bribery with DeLeo in his chambers, and was included in the affidavit merely to prejudice Judge Moran.

This objection is without merit, for several reasons. First, it is an objection which is misplaced in the immediate context, for it suggests no deliberate or reckless falsity. Second, to the extent it represents a contention that the government improperly presented irrelevant information in support of its Title III affidavit, it ignores the role of the judge in evaluating that affidavit. As an experienced and neutral arbiter of the affidavit's sufficiency, Judge Moran was more than able to differentiate between information which was relevant to the probable cause determination and information which was merely extraneous. Only to the extent he was presented with false or distorted evidence would Judge Moran's ability to evaluate the merits of the Title III application have been impaired, and, as already noted, this is not the objection which Shields makes here. Finally, DeLeo's purported history of endeavors to bribe other members of the judiciary was not completely irrelevant, as Shields contends. In any case in which the government seeks leave to conduct a search or electronic surveillance based in part upon information obtained from or through an informant or cooperating witness, the credibility and experience of this individual are, if not dispositive, certainly relevant. Evidence that DeLeo previously had engaged in the type of illicit conduct which the government was attempting to expose tends to lend credibility to the observations and interpretations Cooley reported to the government and at the same time renders it somewhat more likely that individuals such as Marcy and DeLeo would have known and accepted Cooley as an accomplice in corruption. Thus, reference to DeLeo's prior for-

ays into judicial bribery was not improper, nor does it call into question Judge Moran's determination of probable cause.

4. Omission of exculpatory statements by Marcy regarding the possibility of bribing Shields

Bowen's affidavit recounts a series of three conversations between Cooley and Marcy in July, 1988, shortly after the *Nichols v. Wilson* case was filed, in which they discussed whether the case could be reassigned to another judge or, in the alternative, whether Shields could be influenced to dispose of it favorably. Paragraphs 8B and 8C describe these conversations as follows:

> B. On July 14 and 21, 1988, the CW engaged in consensually monitored conversations with Pat Marcy in regard to the status of his, Marcy's, attempts to have the case reassigned to Judge [A] or if possible influence Judge David J. Shields to render a favorable disposition of the matter. Marcy had previously indicated to CW that he could try to have the case reassigned to a favorable judge if the original assignment was not a favorable one. Marcy had also previously indicated that he could help CW on any case CW requested help. Marcy is not an attorney, nor does he have any lawfull [sic] authority to cause a case to be reassigned.
>
> C. On July 26, 1988, the CW engaged in a consensually monitored conversation with Marcy at which time Marcy indicated that he would not be able to do anything on the case because "the court system was just too hot right now and everybody's scared." CW told Marcy he would talk to someone else about the case, and Marcy recommended that CW do that.

Shields argues that Bowen distorted the nature of these conversations (and several others between Marcy and Cooley, to which Bowen makes no reference) in several ways: by omitting certain key statements by Marcy which were exculpatory to Shields, by inventing one quote and by distorting others in order to give them a "sinister cast,"

and by omitting the exculpatory conclusion which should be drawn from the conversations. (App. at 7.)

In order to assess the propriety of Bowen's representations, it is necessary to quote at length from each of the conversations in question. The first took place on July 11, 1988, just before the *Nichols* case was filed. After Cooley describes the facts underlying the case to Marcy, he asks Marcy about the possibility of having the case assigned to a favorable judge:

MARCY: Where's this go who's hearing this?

COOLEY: . . . about, I'm gonna, it hasn't been assigned yet. I'm gonna go file it in the next day or two and it has, it has to be filed in Chancery. Is there any chance of gettin' the thing to [A].[12] Any chance of gettin' the case to him?

MARCY: [A] who?

COOLEY: [A]. Isn't he in Chancery he's in chancery isn't he?

MARCY: Yeah but now it goes through computers.

COOLEY: I mean it must be, there's no way . . .

MARCY: There is no way, no.

COOLEY: There's no way to get around it?

MARCY: No.

COOLEY: Well it, it . . .

---

12 The recording and transcript in this instance reflect the name of a judge who is not the subject of an indictment. The Court has deleted this individual's name in deference to privacy concerns. The same procedure will be employed at trial.

MARCY: All we can do, let me, let me know where it's goin' and then let me go from there.

COOLEY: See if, if we file now, if we file and we don't like the judge we have ten days to SOJ ["Substitution of Judge"]. Once we SOJ, can we do something?

MARCY: Can't do it. I don't know let me find out.

COOLEY: You see, I got, I got twenty thousand from the guy already up front.

MARCY: Let's see where it goes Bob.

COOLEY: Ok.

MARCY: I, I ain't gonna bullshit you but if we can handle the guy fine, if we can't I'm gonna tell you about it.

COOLEY: There's no way to get around the machine though.

MARCY: No way, I tried that a year ago.

(Transcript at 1-2, Tape No. 155, July 11, 1988.) The conversation subsequently concluded with Cooley promising to give Marcy a call. Cooley saw Marcy on July 14, 1988, and informed him that the case had been assigned to Shields:

COOLEY: We got Judge Shields. DAVID SHIELDS

(Kids playing in background)

MARCY: I wouldn't go near him with a ten foot pole.

COOLEY: Ok

MARCY: But I'll tell you let me find out. (ui) putz around with it.

COOLEY: See I've got 10 days.

MARCY: (ui) Let me talk to somebody another Judge.

COOLEY: Ok

MARCY: Let me pick his brain and see what he does.

COOLEY: Ok.

. . .

MARCY: . . . Uh today is Thursday, I'll see this guy Monday, you see, call me Tuesday and I'll tell you whether he is friendly or whether he's (IA).

COOLEY: Ok good.

(Transcript at 1-2, Tape No. 157, July 14, 1988.) Marcy and Cooley spoke again on July 19, 1988, but Marcy had no information for Cooley:

. . .

COOLEY: Any news?

MARCY: No not yet.

COOLEY: Okay well.

MARCY: I got some guy working on it.

. . .

(Transcript at 1, Tape No. 161, July 19, 1988.) On July 21, 1988, Marcy still had no news:

MARCY: Bob, I'm waitin for . . . this afternoon give me a call. I'll find out.

COOLEY: Ok

(Transcript at 1, Tape No. 159, July 21, 1988.) Cooley telephoned Marcy later that day:

. . .

MARCY: Yeah. I talked and he's still trying . . . still trying.

COOLEY: Okay.

MARCY: (Inaudible) so we'll see.

COOLEY: Okay well so we got until like ah Tuesday to ah to make a move.

MARCY: Well if you don't hear from me by Tuesday make it.

COOLEY: Okay PAT.

MARCY: Cause I don't think he's bullshitten he says I'm still trying maybe over the weekend he said.

COOLEY: Well I'll check with you then for sure on Monday, then I'll decide what I'm gonna do.

. . .

(Transcript at 1, Tape No. 162, July 21, 1988.) Cooley called Marcy as promised on the following Monday, July 25, 1988:

. . .

COOLEY: Any news at all?

MARCY: No, no.

COOLEY: Oh.

MARCY: I gotta talk to . . . these guys are scared shitless.

COOLEY: Okay.

MARCY: I'll talk to you about that.

COOLEY: Okay.

MARCY: Alright.

(Transcript at 1, Tape No. 167, July 25, 1988.) Cooley and Marcy met the following day:

MARCY: What happened?

COOLEY: No I mean uh, no good news huh?

MARCY: This guy scared to death. What got the guys talkin to (ui) he says Pat you know what you askin, I know what I'm askin' you. These guys today ain't the right time to talk to these guys. They don't know what's comin' up they bringin' guys in they brought some guys in some judges that got brought back in.

COOLEY: From out-of town you mean.

MARCY: Yeah bringing 'em in so they, they're scared to death.

COOLEY: I got somebody else that maybe can get it moved.

MARCY: Who?

COOLEY: Another guy I'm gonna go see now . . .

MARCY: Go ahead.

COOLEY: . . . and this guy told me he can maybe get it moved anybody in particular might be good.

MARCY: Well

COOLEY: Otherwise its there's no sense in me if you know (ui) . . . if somebody's for sure.

MARCY: I don't know what to tell you.

. . .

COOLEY: I was told until, until you do something before a judge you can still SOJ him and that's why I haven't gone in to get my process server appointed, but my client's on my back now to do something and I can't, I'm not telling him what's going on, I'm not gonna say nothing to him, I just want to try and see if we can do, if we can't do something no sense in my even trying though. If everybody's nervous then there's no sense . . .

MARCY: I don't know what to tell you, I don't you got me out in the woods.

COOLEY: Alright then you know . . .

MARCY: And I'm not gonna fuck around these guys and I know they're gonna flip if they squeeze their neck a little.

COOLEY: Yeah

MARCY: I don't need that shit.

COOLEY: Exactly. Ok.

MARCY: Alright.

COOLEY: Then I'll you know see what's, maybe I'll try on the up and up I might even try that. (laughing)

MARCY: You know that's very possible.

COOLEY: No but I'm just saying its a uh, its a touch and go situation I'd like to have but if we can't uh, if we can't get help we can't get help.

MARCY: If I hear anything I'll reach out for you.

COOLEY: Ok.

(Transcript at 1-2, Tape No. 160, July 26, 1988.) With the content of the conversations between Marcy and Cooley having now been laid out, the Court can turn to Shields' objections to the manner in which Bowen described them in his affidavit.

Shields' first contention is that Bowen's summary is misleading because it omits statements which are exculpatory to Shields. Shields notes that Bowen's affidavit makes no mention of the July 11, 1988, conversation between Cooley and Marcy, in which Marcy stated (1) that there was no way to get around the computerized case assignment system, and (2) that "I ain't gonna bullshit you but if we can handle the guy fine, if we can't I'm gonna tell you about it." The affidavit also does not report Marcy's comment on July 14, 1988, that he wouldn't go near Shields "with a ten foot pole." The import of these statements, Shields suggests, was that "some judges were simply honest and could not be bribed," and that Shields was one of these judges (App. at 10-11); indeed, Cooley himself later told DeLeo that "Pat [Marcy] says Shields can't be talked to" (Transcript at 3, Tape No. 163, Aug. 16, 1988.) By failing to mention these statements in Bowen's affidavit, Shields argues, the government falsely implied that Shields could be bribed, when the omitted statements actually indicated the opposite. (App. at 11.)

Shields next challenges several of the representations in Bowen's affidavit which he contends were either inventions or distortions of what Marcy had in fact said to Shields. The first objection in this regard concerns Bowen's representation that on July 26, 1988, "Marcy indicated that he would not be able to do anything on the case because 'the court system was just too hot right now and everybody's scared.'" (Bowen Aff. ¶8C.) Nowhere on the tape recording of this conversation does Marcy actually use these words, and Shields contends that Bowen fabricated the quote to imply that in Marcy's view, Shields could not be bribed to fix the *Nichols* case only because of heightened scrutiny of the Cook County courts rather because of a principled unwillingness on Shields' part to accept bribes. (App. at 12.)

Shields' second objection argues that the affidavit distorts Marcy's remarks about Cook County judges being scared by im-

plying that Marcy was in direct contact with Shields, when in fact the particular words Marcy used ("these guys are scared shitless"; "[t]hese guys today ain't the right time to talk to these guys"; "they're scared to death"; "I'm not gonna fuck around these guys"; "I know they're gonna flip if they squeeze their neck a little"; "[t]hey don't know what's comin' up" (July 26, 1988); "[l]et me talk to somebody another Judge" (July 14, 1988)) indicate that Marcy was not dealing with Shields at all. (App. at 12-13.) Indeed, Shields argues, the emphasis of the conversations between Cooley and Marcy was not upon trying to bribe Shields, but upon trying to have the case reassigned to another judge who could be bribed. (*Id.* at 13.)

Third, Shields asserts that the government, in order to further impugn Shields and corroborate DeLeo's boasts that he could bribe Shields, falsely suggested to Judge Moran that Cooley and Marcy had discussed someone other than Marcy who might be able to bribe Shields. Shields contends that this is the clear implication of Bowen's representation that "CW told Marcy he would talk to someone else about the case, and Marcy recommended that CW do that." (Bowen Aff. ¶8C.) In fact, Cooley told Marcy that he had "somebody else that maybe can get it moved," and that "anybody in particular might be good," indicating, in Shields' view, that he simply knew someone who could help him get the case reassigned. (App. at 13.)

Finally, Shields complains that the government purposely crafted Bowen's affidavit in such a way as to fend off the exculpatory conclusion which Judge Moran would have drawn from an accurate portrayal of the conversations between Marcy and Cooley. The government went to great lengths in Paragraph 6 of Bowen's affidavit to stress Marcy's ability to corrupt members of the judiciary, Shields contends, yet the conversations between Marcy and Cooley reveal that Marcy was unable to bribe Shields. DeLeo, in contrast, was "small potatoes." (App. at 14.) In Shields' eyes, there is only one conclusion to be drawn from these conversations: "if Marcy, who the government contended was a master fixer, could not fix the case, there is no way that Pat DeLeo could fix the case." (*Id.*) Only by intentionally distorting what Marcy had told Cooley,

Shields argues, was the government able to prevent Judge Moran from reaching this same conclusion. (*Id.*)

With respect to the first argument concerning the omission of exculpatory information, the government relies upon *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990), for the proposition that "omitted information that is potentially relevant but not dispositive is not enough to warrant a *Franks* hearing." The government also argues that the conclusion which Shields distills from the purportedly omitted statements — that DeLeo could not fix the case if the more skilled Marcy could not — is "nonsense". (Gov. Mem. at 43.) In the government's view, an official's reluctance to accept a bribe from one individual does not rule out the possibility that he might be more willing to deal with someone else. At the same time, the government asserts, statements like Marcy's — "I wouldn't go near him with a ten foot pole" — are not exculpatory. Proof that Shields would not take money from Marcy is not proof that he would not accept a bribe from DeLeo, and the thrust of Bowen's affidavit was that surveillance of Shields' chambers would reveal DeLeo bribing Shields. (*Id.*) Moreover, Marcy's statement was merely an expression of personal opinion, the government points out, and one which would not have influenced Judge Moran's decision. (*Id.* at 43-44.)

With respect to Shields' charge that Bowen manipulated Marcy's statements to render them incriminating, the government contends that Shields has completely misread the affidavit. Bowen did not attribute to Marcy any statement connoting a corrupt relationship between Shields and himself, the government notes. (*Id.* at 44 & n.21.) Indeed, according to the government, Bowen's affidavit made clear that Cooley and Marcy had simply discussed two options: (1) having the case reassigned to another judge whom Marcy knew to be cooperative or (2) influencing Shields, *if that were possible*. (*Id.* at 44, citing Bowen Aff. ¶8B.) Bowen's representation that Marcy had said "the court system was just too hot right now and everybody's scared" (Bowen Aff. ¶8B) was plainly not an implicit reference to Shields, the government argues; and to the extent that it was not an exact quote, it was nonetheless an accurate paraphrase of Marcy's statements. (*Id.* at 45-46.) In sum, the government contends, Bowen accurately described Cooley's

discussions with Marcy as to the possibility of fixing the *Nichols* case. The affidavit hid no exculpatory evidence from Judge Moran, and did not falsely portray these explorations as incriminating of Shields. (Gov. Mem. at 41-46.)

The Court has carefully reviewed each of the transcripts reflecting the meetings between Cooley and Marcy, and finds that Bowen's affidavit contains no significant misrepresentations or omissions concerning those meetings. The affidavit accurately summarizes the thrust of the conversations as well as the outcome. In this Court's view, no misimpression was conveyed to Judge Moran.

The affidavit is not wanting on the ground that it omitted exculpatory information. In the first instance, none of the statements which Shields contends should have been included are truly exculpatory. The most helpful among the lot is Marcy's statement that he wouldn't go near Shields "with a ten foot pole." One way to interpret this statement is that Marcy believed Shields would not accept a bribe. But certainly there are other ways to construe this statement. Ultimately, the government is correct in observing that the statement is nothing more than an expression of Marcy's opinion. Other statements, such as Marcy's promise to be candid with Cooley as to whether the judge assigned to the *Nichols* case could be bribed, taken in context might also suggest that Marcy came to the conclusion that he could not bribe Shields. Marcy's explanation that there was no way around the computerized case assignment system did nothing more than squelch whatever notion Cooley may have had about getting Marcy to rig the case assignment; it does not reflect upon the character of any judge, including Shields. Plainly, Cooley did strike out with Marcy, but that outcome is quite clear from Bowen's affidavit. None of the omitted statements would have added anything of substance to the affidavit, for they supplied no relevant information as to whether or not DeLeo would be able to bribe Shields.

Moreover, whatever slight exculpatory quality the omitted statements may have possessed, their omission does not call the adequacy of Bowen's affidavit into question. In *Colkley*, *supra*, 899 F.2d at 302-03, the Fourth Circuit rejected the defendant's ar-

gument that the Fourth Amendment imposed a duty upon the government to disclose potentially exculpatory evidence when it applied for a warrant. The court articulated three reasons for its holding, which this Court finds persuasive. First, although *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), imposes a duty upon the government to reveal exculpatory evidence which might have an impact upon a verdict, the *Brady* rule applies in the trial setting, where the defendant enjoys a presumption of innocence and a due process right to a fair trial. 899 F.2d at 302. Probable cause determinations, however, are merely preliminary, and do not carry with them ramifications commensurate with an ultimate adjudication of guilt or innocence. *Id.* Second, whereas *Franks* requires a showing that information was deliberately or recklessly misrepresented or withheld from the judge issuing the warrant, *Brady* eschews inquiry into the prosecutor's intent and focuses solely upon the materiality of the information. Because warrant applications are made at an early stage of the proceedings when it may be difficult to assess whether or not a given piece of information is exculpatory, it may be unreasonable to import into this context the broad duty of disclosure which *Brady* imposes. *Id.* at 303. Third, reading a *Brady* obligation into the Fourth Amendment "would severely disrupt the warrant process." *Id.*

> The rule would place an extraordinary burden on law enforcement officers, who might have to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded. It would perforce result in perniciously prolix affidavits that would distract police officers from more important duties and render the magistrate's determination of probable cause unnecessarily burdensome. In addition, a broad duty of inclusion would turn every arrest or search into a warrant contest. Such consequences would, in turn, discourage reliance on warrants, a result the Supreme Court has stated should be avoided in shaping Fourth Amendment doctrine.

Id. (citation omitted). *Colkley* itself acknowledges that there may be instances in which it preliminarily appears that the government deliberately withheld exculpatory information material to the probable cause determination, thus requiring a *Franks* hearing. 899 F.2d at 303. This was not one of those instances, given Bowen's essentially accurate summary of the Cooley-Marcy encounters and the immaterial nature of the omitted details which Shields has cited. Absent such a showing, a Franks hearing cannot be compelled on the ground that the government failed to disclose potentially exculpatory information when it sought the warrant.

Nor is a *Franks* hearing required on the ground that Bowen intentionally distorted the content of Cooley's conversations with Marcy, for there is no evidence of such distortion in Bowen's affidavit. The first purported instance of misrepresentation that Shields has cited is at worst another example of the misplaced quotation mark. As is evident from the tapes and transcripts of the July 25 and 26 exchanges between Cooley and Marcy, Marcy never said "'the court system was just too hot right now and everybody's scared.'" (Bowen Aff. ¶8C.) To the extent Bowen's affidavit suggests that Marcy used these exact words, it conveys a misimpression. Yet, once again, the context of Bowen's statement need not be read this way. As with the earlier objection involving Bowen's use of quotation marks, his concurrent use of the word "indicated" reasonably may be construed as a signal that the subsequent passage enclosed within the quotation marks was intended as a paraphrased version of what the speaker said rather than a verbatim quote. Even if one indulges in the presumption that Bowen meant to convey the impression of an exact quote, the deviation from Marcy's exact words is of no import. The statements Marcy actually made (*e.g.*, "these guys are scared shitless"; "today ain't the right time to talk to these guys"; "they're scared to death") convey the same idea that Bowen's paraphrased version does — that the judges who might otherwise be willing to cooperate with Marcy were presently too nervous to do so. Thus, the Court finds it highly unlikely that Judge Moran was at all misled as to the content of Marcy's remarks.

Shields' suggestion that Bowen's affidavit was crafted in such a way as to imply that Marcy was speaking of Shields in particular is completely off base. In summarizing Marcy's report of the jitters

his contacts were having, Bowen nowhere uses Shields' name, or even a singular pronoun such as "he" or "him". Bowen's actual statement is worth repeating: "Marcy indicated that he would not be able to do anything on the case because 'the court system was just too hot right now and everybody's scared.'" (Bowen Aff. ¶8C.) To read this statement either as implying that Marcy had been in touch with Shields or as saying *anything* about Shields in particular (let alone that Shields would be willing to accept a bribe but for the present air of nervousness) requires quite a leap of the imagination. Shields has shown no basis for attributing such a leap to Judge Moran, nor for attributing to Bowen the intent that Judge Moran make such a leap.[13]

Equally implausible is Shields' suggestion that when Bowen wrote, "CW told Marcy he would talk to someone else about the case, and Marcy recommended that CW do that" (Bowen Aff. ¶8C), he intended to mislead Judge Moran into thinking that Cooley and Marcy had discussed someone in particular who might be able to bribe Shields. As the transcript of the July 26 meeting reveals, Bowen's statement is completely true to the actual exchange between Cooley and Marcy on this subject. Nothing in the affidavit can be construed to suggest either that Marcy and Cooley discussed anyone by name, or that the particular individual to whom Cooley had referred would be able to bribe Shields. Once again, there is no hint of deliberate or reckless misrepresentation.

---

13 Even if Bowen's affidavit could be read to imply that it was Shields who was "scared," the implication would not be completely without support in Marcy's own statements on the subject. As set forth above, when Cooley met Marcy on July 26, 1988, one of Marcy's first remarks was "*This guy* scared to death." (Transcript at 1, Tape No. 160, July 26, 1988.) (Emphasis supplied.) From the context of this conversation and those which preceded it, one might reasonably infer that Marcy was speaking of Shields when he made this statement. Of course, the Court expresses no opinion as to whether such an inference would be accurate, and merely notes it to emphasize the absence of any impropriety in Bowen's summary of Marcy's remarks.

Having disposed of the individual objections Shields has raised with respect to this portion of the affidavit, the Court similarly must dismiss Shields' objection to the overall thrust of Bowen's summary. There is no ground to argue, as Shields does, that Bowen misrepresented the discussions between Marcy and Cooley so as to hide the ultimate outcome — Marcy's inability to do anything for Cooley. Bowen did not hide from Judge Moran the fact that Marcy, the purported "master fixer," could not bribe Shields. To the contrary, that fact is made quite plain in Bowen's affidavit. (*See* ¶8C.) Accordingly, assuming that there was any exculpatory value in this scenario, Judge Moran had the full benefit of it in determining whether DeLeo, whom Shields characterizes as "small potatoes," was able to accomplish what Marcy apparently could not in this instance.[14]

5. Failure to acknowledge that Judge Salerno had previously denied accepting bribes from DeLeo

Shields contends that the Bowen affidavit is also misleading when it reports that former Circuit Court Judge Frank Salerno had acknowledged taking bribes from DeLeo without mentioning that Salerno had previously denied doing so. The relevant portion of Bowen's affidavit states:

> Former Cook County Circuit Court Judge Frank Salerno has been cooperating since his guilty plea to judicial corruption charges in October 1987. Salerno advised that during the years 1983 through 1985 he

---

14 As noted above, the fact that Marcy was unable to influence Shields does not rule out the possibility that someone else, in particular DeLeo, might be able to do so. Notwithstanding the contrast which Shields attempts to draw between Marcy and DeLeo (the "master fixer" versus "small potatoes"), the admissions of former judge Frank Salerno and members of the Chicago Police Department Licensing Unit that they had accepted bribes from DeLeo in the past (*see* Bowen Aff. ¶7) tend to indicate that DeLeo was as able to influence members of the judiciary as Marcy.

> regularly received money from attorney Pat DeLeo in return for favorable rulings on DeLeo's cases and in return received an envelope from DeLeo containing from $300-$1,000 per month. This arrangement continued until February of 1985 when Salerno was removed from Licensing Court after media reports that he was under investigation in Operation Greylord.

(Bowen Aff. ¶7.) Shields contends that this information was included in the affidavit in order to bolster the credibility of DeLeo's representations to Cooley that he could bribe Shields. (App. at 15.) Yet, the government failed to mention that during an extensive proffer which Salerno made to the government in May of 1987, prior to his guilty plea, Salerno had twice denied accepting any bribes from DeLeo, a fact purportedly reflected on FBI summaries of the proffer.[15] In one instance, Salerno represented that he knew DeLeo as an attorney who practiced in Licensing Court and had sold DeLeo tickets to political fundraisers, but denied having accepted money from him in exchange for favorable treatment from the bench. On another occasion, Salerno provided a list of people who had either paid bribes to him, shared bribes with him, or accepted bribes from him. DeLeo evidently was not on this list. The FBI was aware of this "explosive evidence" at the time Bowen's affidavit was prepared, but Shields maintains that mention of it was deliberately omitted in order to bury the inconsistency in Salerno's representations, to avoid the accompanying loss of credibility, and thus to mislead Judge Moran. (App. at 16-17.)

The government contends that there was nothing improper in the failure to mention Salerno's prior inconsistent statement. Similar omissions have been upheld in other cases, the government notes, and here the omission does not call into question Judge Moran's determination of probable cause. The government represents

---

15 Shields indicates that he is prepared to present the FBI 302 reports which reflect Salerno's statements at an evidentiary hearing. These 302s have not been submitted to the Court. However, for present purposes, the Court has assumed that Shields has accurately portrayed their contents.

that when he recanted upon his initial denial that he had taken bribes from DeLeo, Salerno indicated he had feared for the safety of himself and his family. Moreover, the fact that Salerno had implicated DeLeo in the course of cooperating with the government after his own conviction and sentencing was clear from Bowen's affidavit. Consequently, the government contends, it may be assumed that Judge Moran understood there was a basis upon which to impeach Salerno's credibility. (Gov. Mem. at 46-48.)

The Court perceives nothing "explosive" in Salerno's prior denial of bribe-taking from DeLeo, and finds that the omission of this information was immaterial. Salerno's prior statement certainly is impeaching, but the contention that the government should routinely include impeachment material in warrant applications implicates concerns identical to those which militate against a requirement that the government include all exculpatory information in such applications as well. The Fourth Amendment envisions a search for probable cause, not guilt beyond a reasonable doubt. Prior inconsistent statements may be material in the trial setting, but they need not routinely be included in a warrant application. Certainly this was not a situation in which the witness' prior statement was material to the determination of probable cause. As the government notes, the First Circuit so concluded in *United States v. Rumney* 867 F.2d 714, 720 (1st Cir.), *cert. denied*, 491 U.S. 908, 109 S. Ct. 3194 (1989), finding that "[the witness'] credibility was not undercut merely because he made predictable denials until the police could produce evidence linking him to the robbery." Here, Shields suggests that Salerno's first statement was likely more reliable than his subsequent recantation, because after sentencing Salerno had a greater motive to help himself out by pointing the finger at others. (App. at 17.) Yet, the opposite could be argued just as forcibly, for any defendant facing sentencing or even simply facing charges may wish to improve his standing in the eyes of the government and the court by exposing the wrongdoing of others. The bottom line is that nothing in Salerno's about-face necessarily suggests that one statement or the other was more likely correct. Moreover, to the extent that Salerno had an incentive to fabricate at the time he incriminated DeLeo, this was implicit in the disclosure that he had been sentenced and was now cooperating,

as the government contends. "After all, we expect . . . judicial officers to be only neutral and detached — not naive and ingenuous." *United States v. Reivich*, 793 F.2d 957, 963 (8th Cir. 1986). Thus, the court in *Reivich* concluded that the government's failure to mention the promises of leniency the police had given to their informants were not material to the probable cause determination, where the magistrate who issued the warrant had been made aware of their arrests, and thus "could easily have suspected and taken into account the typical kind of bargaining involved here." *Id.*, citing *People v. Kurland*, 28 Cal.3d 376, 392-94, 168 Cal. Rptr. 667, 677-78, 618 P.2d 213, 223-24 (1980), *cert. denied*, 451 U.S. 987, 101 S. Ct. 2321 (1981).

6. Misrepresentation of Cooley's former affiliation with DeLeo's Law Firm

In the portion of his affidavit introducing Cooley, Bowen represented that Cooley had been associated with DeLeo's law firm. Shields contends that this is "pure fiction," designed to portray Cooley as someone close to DeLeo and thus unlikely to be the victim of mere boasting on DeLeo's part. (App. at 17.) In relevant part, the affidavit states:

> . . . The CW, prior to cooperating with the federal government, has made payoffs to judges and other court personnel. A number of these payoffs have involved cases dealing with organized crime figures. The CW became acquainted with these individuals approximately 15 years ago when he established a friendship with now Illinois State Senator, John D'Arco, Jr., the son of John D'Arco, Democratic Committeeman for the First Ward of Chicago.
>
> As a result of the friendship with D'Arco, the CW was asked to join the law firm of Kugler, DeLeo & D'Arco. During his association with the firm, the CW became acquainted with Patrick Marcy, the secretary for the First Ward Democratic Organization. Marcy is an associate of DeLeo and both D'Arcols.
>
> . . .

> The CW advised that he broke away from the law firm approximately five to six years ago when he determined that he was losing business because the firm was utilizing attorneys working for the City of Chicago's Corporation Counsel's Office to take care of the firm's business while they were on City time. The firm was able to utilize this City office because of the influence exerted (sic) over Anthony Bertuca, Chief of Traffic Division, of the Corporation Counsel's Office by Patrick Marcy and John D'Arco, Jr., who the CW believes were responsible for putting Bertuca in the position. The CW still maintains a good relationship with the firm, especially with Pat DeLeo, and continues to receive referrals from them.
>
> CW has had numerous conversations with DeLeo during which DeLeo discussed his activities while serving as a Chicago Corporation Counsel in Licensing Court. DeLeo was still associated with the law firm while working as a corporation counsel. These conversations occurred while CW was still associated with the law firm. DeLeo discussed how he would pay off licensing police officers, and how he would accept payoffs from vending machine owners. CW observed a number of licensing police officers in the law office. On certain occasions, DeLeo would tell CW to be the attorney for the defendant in Licensing Court cases, while DeLeo would serve as prosecutor. DeLeo would often then dismiss the case.
>
> . . .

(Bowen Aff. ¶¶ 6A, 6C, 6D.) Shields represents that his counsel have obtained "irrefutable evidence," which they would present at an evidentiary hearing, that Cooley was never a member of DeLeo's law firm, that he never shared offices with the firm, and that DeLeo had not even referred a case to Cooley for at least eight years prior to the date of Bowen's affidavit.

The government's initial response to this challenge is that Shields' promise of irrefutable evidence is not enough; rather, Shields must either present that evidence or provide a satisfactory excuse for his inability to do so in order to obtain a *Franks* hearing. Next, the government contends, Shields makes no argument that Bowen knew of the inaccuracy. Finally, in the government's view, any error on this point was immaterial, for even absent a formal business relationship between Cooley and DeLeo's law firm, the affidavit supplies other information which discounts the possibility that DeLeo was simply "scamming" Cooley. For example, the affidavit reveals that Cooley and Marcy, an associate of DeLeo's, previously had engaged in bribery together; and it further reveals that other officials, *e.g.*, Judge Salerno, had taken bribes from DeLeo.

The Court agrees that Shields has not met his burden of proof as to this aspect of the affidavit. Shields has not provided so much as a clue as to what his "irrefutable evidence" is, let alone detail it in an affidavit as he must. Nor has Shields made a proffer of this evidence or tendered an explanation for his inability to submit the evidence itself. In such a circumstance, a deliberate or reckless falsity cannot simply be assumed. *See Franks*, 438 U.S. at 171, 98 S. Ct. at 2684; *United States v. McDonald*, *supra*, 723 F.2d at 1294 ("the defendant must do more than construct a self-serving statement which refutes the warrant affidavit"); *United States v. Costello*, 610 F. Supp. 1450, 1462 (N.D. Ill. 1985) (Roszkowski, J.), *aff'd without published opinion*, 830 F.2d 195 (7th Cir. 1987) (defendants' contention at oral argument that they could prove, contrary to warrant affidavit, that judge never sat in gambling court did not suffice to require *Franks* hearing). *See also United States v. Pace*, 898 F.2d 1218, 1227-28 (7th Cir. 1990).

Moreover, as Judge Roszkowski emphasized in *Costello*, "In order to overcome *Franks*' presumption of validity and make the requisite preliminary showing, a defendant must provide *substantial evidence* that the affiant knew his allegations to be false, that he actually entertained substantial doubts as to the truth of the information, or that he had obvious reasons to doubt its veracity." 610 F. Supp. at 1460 (emphasis in original), citing *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984). Shields has made no attempt

to show that Bowen knew Cooley had not been associated with DeLeo's firm or had reason to doubt the representation that he had been. This failure constitutes a second ground on which Shields' argument fails. Finally, assuming the representation was inaccurate, eliminating it from the affidavit would not undermine the government's demonstration of probable cause. "Probable cause requires only a 'fair probability,' and not a certainty . . . . " *Reivich*, 793 F.2d at 960. Shields continually insists that DeLeo was simply "rainmaking," taking money from Cooley without any intent or ability to carry through on his boasts that he could bribe Shields. This is a theory for the jury, however. Although Bowen's affidavit may not have portrayed DeLeo as an honest, upstanding citizen whose word may be taken at face value (*see* Shields Mem. at 10, citing *Illinois v. Gates*, *supra*, 462 U.S. at 233, 103 S. Ct. at 2330), nothing in his alleged history of corruption necessarily required the government to dissolve all suspicion that DeLeo simply may have been "scamming" Cooley. Indeed, DeLeo's purported experience in bribery might be read to bestow credibility upon his representations regarding Shields. In any case, to the extent circumstances tending to rule out the possibility of a scam bolstered the probable cause determination, the purported tie between Cooley and DeLeo's firm was not critical. As the government has maintained, there were other circumstances set forth in the affidavit which tended to show that DeLeo was not simply boasting about the ability to bribe a judge. (*See* Bowen Aff. ¶¶6B, 7.) Accordingly, even if the Court were to assume without foundation that Bowen's representation concerning Cooley's affiliation with the firm constituted a deliberate or reckless misrepresentation, it surely was not one which was material to Judge Moran's determination of probable cause.

7. Misrepresentations regarding Cooley's statements purportedly inculpating Shields

Shields' last specific objection concerns Paragraph 9 of the affidavit, in which Bowen discusses the adequacy of alternatives to the electronic monitoring for which the government was seeking authorization. In pertinent part, that paragraph states:

. . .

> CW is willing to testify and has provided and will continue to provide direct evidence as it concerns Pat F. DeLeo. However, as has been indicated in this affidavit, CW has not been able to obtain and provide direct evidence of Judge David J. Shields soliciting and accepting bribes from Pat F. DeLeo and others as yet unknown. CW has not and probably will not be in a position to make contact with Shields when Shields is soliciting and accepting bribes because, from my experience and from the experience of other Special Agents of the Federal Bureau of Investigation, high-ranking corrupt officials, such as judges, insulate themselves from direct exposure to the unlawful payments. Therefore, even with the assistance of CW, all of the offenders could not be identified.
>
> . . .
>
> I know from my experience and the experience of other Special Agents of the Federal Bureau of Investigation that the use of an undercover agent in this instance is unlikely to succeed. Shields appears to be very careful not to take bribes from a lawyer if a third party is present. Moreover, although CW is well known to Shields, *Shields appears unwilling to permit CW entrance to his corrupt circle.* New lawyers would have great difficulty gaining Shields' confidence, therefore, an undercover agent posing as a corrupt attorney is unlikely to be able to gain Shield's [sic] confidence such that Shields would engage in criminal transactions in his presence.

(Bowen Aff. ¶9.) (Emphasis supplied.) Shields attacks the highlighted passage because, in his view, it assumes that Shields in fact had a corrupt circle, that Cooley knew about it, and that Cooley had attempted unsuccessfully to gain admission. (App. at 18.) This was a distortion of the record, Shields argues, because although Cooley had known Shields for years, he had no first-hand knowledge that Shields was corrupt; in fact, as far as he knew, Shields was an honest judge. (*Id.* at 18-19.)

The government argues that Shields has again misconstrued Bowen's affidavit. Bowen does not attribute any statement or belief that Shields was corrupt to Cooley, it notes. Rather, a fair reading of the affidavit reveals that it was Bowen who had concluded, based upon the circumstances previously summarized, that Shields was corrupt. Moreover, the propriety of Bowen's rhetorical reference to Shields' "corrupt circle" aside, it was not offered in support of probable cause, the government observes. Instead, the statement is included in the section of Bowen's affidavit regarding the necessity of electronic surveillance. Thus, whatever challenge Shields might mount to the accuracy of the statement is moot, for it had no bearing upon Judge Moran's assessment of probable cause.

Shields' attack on Bowen's statement does miss the mark. As the government has noted, the location of the statement within the affidavit belies any contention that it was offered as "evidence" in support of probable cause. Further, it is plain both from the wording and the context of the statement that it was merely Bowen's characterization. The statement attributes nothing to Cooley, but merely reflects Bowen's conclusion that Cooley would not be permitted direct access to Shields. Finally, and perhaps most importantly, to suggest that an experienced judge like Judge Moran would have been misled by Bowen's statement defies all reason. Bowen was clearly drawing conclusions based upon his experience and the information he had obtained in the course of this investigation, and this fact is clear from the context and tenor of Bowen's remarks.

8. Bowen's state of mind

In light of the foregoing series of purported misrepresentations in the affidavit, Shields maintains that Bowen intentionally slanted his affidavit in such a way as to manufacture probable cause to believe Shields was engaged in corrupt activity. "An experienced agent, such as Bowen . . . had to know . . . that DeLeo might well be working the oldest scam around a courthouse: *larceny by trick*; the selling of a phony fix." (App. at 19) (Emphasis in original.) Thus, Shields posits, Bowen set out to rewrite the facts in order to discount that probability. Over and above the alleged mis-

representations and omissions discussed above, a "shocking falsehood" included in a second affidavit submitted in the government's subsequent application for renewal of the Title III authorization evinces an intent to deceive, according to Shields. That affidavit describes two conversations between Shields and DeLeo which had been intercepted in shields' chambers on August 31, 1988 and September 2, 1988. At the August 31, 1988 meeting (when, according to the indictment, DeLeo paid Shields $2,500), according to Bowen's affidavit, DeLeo "made the statement 'here's your cut.'" (Bowen Aff. Sept. 27, 1988 ¶7.) Shields contends that this statement was fabricated.

The government simply responds that Shields is wrong, contending that although Shields' counsel may not be able to hear this statement on the tape, Bowen is not the only person who can. Moreover, in the government's view, it defies logic to suggest that Bowen would offer up a false quotation that he surely knew would later be exposed by the tape recording of the conversation. According to Shields' scenario, the government contends, "[s]uddenly the agent who so cleverly deluded Judge Moran in the manner of Lex Luthor began to act like Barney Fife." (Gov. Mem. at 51.)

Setting aside the plausibility of Bowen inventing this quotation, the Court agrees that there is no evidence that he did SO. As it has in every other instance in which there has been an objection either to the accuracy of the transcript or to Bowen's characterization of a conversation, the Court has listened to the pertinent tape recording. This particular conversation between Shields and DeLeo is at times difficult to hear, and this no doubt explains why the government's transcript of the conversation does not include the "here's your cut" statement. Nonetheless, having reviewed the recording, and recognizing that there is room for disagreement, the Court is satisfied that a reasonable person could discern this statement on the tape. Accordingly, there is no evidence that Bowen did anything but faithfully report what he actually heard DeLeo say in that conversation.

It should be apparent from the disposition of this objection and each of the others Shields has raised that the Court finds no merit to Shields' contention that Bowen engaged in either inten-

tional or reckless distortions in the affidavits he submitted to Judge Moran. At the very worst, the current record reveals only arguable mistakes in the affidavit, none of which were material to the probable cause determination. Shields' attempt to attribute Machiavellian motives to Bowen fails completely. There is no need in this instance for a *Franks* hearing, and the defendants' request for one is denied. *See Costello*, 610 F. Supp. at 1460, 1464.

C. Showing of Probable Cause

As a prerequisite to an order authorizing electronic surveillance, Title III requires a federal judge to find probable cause to believe that an individual is committing or has committed a crime and that the surveillance will intercept communications concerning this activity. 18 U.S.C. §2518(3)(a) and (b). Shields contends that Bowen's affidavit failed to establish such probable cause and that Judge Moran therefore erred in authorizing the government to monitor his chambers. The standard which governs review of probable cause determinations is set forth in *Illinois v. Gates*, *supra*, 462 U.S. 213, 103 S. Ct. 2317. There the Supreme Court embraced a "totality of the circumstances test":

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States*, 362 U.S., at 271, 80 S. Ct., at 736.

462 U.S. at 238-39, 103 S. Ct. at 2332.

Shields contends that Gates does not govern Title III determinations, because the statute was enacted prior to the Supreme Court's decision in Gates and was intended to incorporate the traditional standard of probable cause. (Shields Mem. at 5 n.3.) However, as Shields prudently points out, the Seventh Circuit has

applied Gates without qualification in Title III cases. *See United States v. Zambrana*, 841 F.2d 1320, 1332-33 (7th Cir. 1988); *United States v. Williams*, *supra*, 737 F.2d at 602 n.5, 604. Moreover, at least four other circuits have explicitly rejected the contention that Title III demands a more compelling showing than ordinary warrant applications. *See, e.g., United States v. Leisure*, 844 F.2d 1347, 1354 (8th Cir.) ("affidavits in support of electronic surveillance orders are to be judged by the same standards as conventional search warrants; the statutory probable cause standards set out in Title III are coextensive with the constitutional requirements embodied in the fourth amendment"), *cert. denied*, 488 U.S. 932, 109 S. Ct. 324 (1988); *see also United States v. Talbert*, 706 F.2d 464, 467 (4th Cir. 1983); *United States v. Fury*, 554 F.2d 522, 530 (2d Cir.), *cert. denied*, 433 U.S. 910, 931, 97 S. Ct. 2978, 2831 (1977); *United States v. Falcone*, 505 F.2d 478, 481 (3d Cir. 1974), *cert. denied*, 420 U.S. 935, 95 S. Ct 1339 (1975). In any event, the Supreme Court's endorsement of the "totality of the circumstances" test in Gates simply marked a return to an "analysis that traditionally has informed probable cause determinations." 462 U.S. at 238, 103 S. Ct. 2332. Thus, the Gates test is perfectly consistent with the "traditional" standard of probable cause which Congress purportedly meant to adopt when it enacted Title III (Shields Mem. at 5 n.3.), and this is the test the Court will apply here.

Before considering whether Bowen's affidavit meets the probable cause inquiry called for by *Gates*, the Court must dispose of Shields' contention that the government was required to demonstrate, and Judge Moran was required to find, more than a "fair probability" of unearthing wrongdoing through the surveillance. Shields argues that because the subject of the surveillance in this case was a judge, a "fair probability" of unearthing wrongdoing is not enough. Starting with the premise that "[j]udicial independence . . . is a bed-rock principle of the concept of the rule of law," (Shields Mem. at 6), Shields goes on to suggest that in order to establish probable cause to monitor his chambers, the government was required to show, and Judge Moran was required to find, that it was "substantially more probable than not" that the surveillance would disclose evidence of a crime (*id.* at 7).

This is a most disquieting invitation. The Court has no quarrel with the notion that an independent judiciary is crucial to our system of justice. But there is a distinction to be made between independence and impunity, and the line of demarcation cannot be drawn more generously for judges than it is for other citizens. The vitality of an adversarial system which calls upon its litigants to zealously advocate their own interests depends perhaps more than any other upon a judiciary which is free from all hint of corruption. Judges must not be held above those whom they judge in the investigation of wrongdoing; the same quantum of proof which allows the constable to walk through the door of a family's home suffices to permit entrance to a judge's chambers.

Any notion that the separation of powers doctrine calls for a different standard was laid to rest in *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (per curiam), *cert. denied*, 417 U.S. 976, 94 S. Ct. 3183 (1974). There the court of appeals rejected former governor and circuit judge Otto Kerner, Jr.'s contention that the constitution and separation of powers forbade his trial on bribery charges unless and until he had been impeached:

> We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the coequal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials.

Id. at 1144. This rationale applies with full force here. The office of judge does not supply its holder with greater protection from police scrutiny than the Fourth Amendment provides to others. As the court noted in *Isaacs*:

> All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly

> bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

493 F.2d at 1143, quoting *United States v. Lee*, 106 U.S. 196, 220, 1 S. Ct. 240, 261 (1882). *See also United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir.), *cert. denied*, 469 U.S. 829, 105 S. Ct. 113 (1984); *United States v. Hastings*, 681 F.2d 706, 711 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203, 103 S. Ct. 1188 (1983).

Bowen's affidavit meets the "fair probability" test outlined in *Gates*. One might reasonably read the affidavit to establish, *inter alia*: that Cooley and DeLeo had bribed judges and other public officials on prior occasions; that Cooley and DeLeo had both engaged in this activity with Marcy and other members of Chicago's First Ward power structure; that DeLeo had told Cooley he could bribe shields; that DeLeo had taken $2,500 from Cooley for the express purpose of bribing Shields to rule favorably in the *Nichols v. Wilson* suit; that DeLeo appeared to have met with Shields just prior to the hearing on August 19, 1988; that Shields had granted Cooley's motion for a temporary restraining order; and that on August 24, 1988, DeLeo had indicated to Cooley that Shields was satisfied with the money that Cooley had provided previously and had proposed to Cooley that they give Shields an additional "two bits" in exchange for a favorable ruling at the next hearing scheduled for August 29, 1988. Under these circumstances, the Court finds that Judge Moran had a substantial basis for concluding that there was a fair probability surveillance of Shields' chambers would reveal evidence that he was accepting bribes. The Court expresses no opinion beyond this one; the truth of the government's allegations remains a matter for the jury to determine after trial.

D. Showing of Necessity

As a further prerequisite to the authorization of electronic surveillance, Title III requires a judge to determine that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §2518(3)(c). Paragraph 9 of Bowen's affidavit addresses this requirement. In that paragraph, Bowen outlines the

alternatives to electronic surveillance normally employed in public corruption cases, including development of informants or witnesses, interviews, physical surveillance, subpoenaing of records, compelled testimony, utilization of search warrants, use of undercover agents, use of pen registers, and information from public records. Bowen then proceeds to outline the reasons why, in his opinion, these options either had already failed or were likely to do so:

(a) Cooley was able to obtain direct evidence against DeLeo and was willing to testify, but likely would not be able to obtain any direct evidence regarding Shields because high-ranking officials such as judges tended to avoid direct receipt of bribes;

(b) It was unlikely the government would be able to obtain evidence through other lawyers, for those who were most likely to know whether a given judge accepted bribes were the lawyers who had done the bribing, and these individuals would be reluctant to risk disbarment by disclosing their misdeeds;

(c) It was unlikely that evidence could be obtained from court employees, since most held patronage positions and were reluctant to risk them by cooperating with the FBI. Moreover, the evidence which had been obtained from such individuals in the past tended to be nonspecific, due to the secrecy and privacy attending this type of criminal activity.

(d) Although grand jury subpoenas, search warrants, and a review of public records could be used to obtain certain corroborating information, given the wide discretion judges possess, these avenues of investigation were unlikely to yield any hard evidence of judicial corruption;

(e) Physical surveillance had been attempted, but because the key meetings between Cooley and DeLeo took place within the privacy of Shields' chambers, this avenue had failed to yield any direct evidence as to Shields;

(f) Use of an undercover agent would be unlikely to succeed, given that Shields appeared not to accept a bribe in the presence of a third party, Cooley had not been admitted into Shields' "circle" even though he was well known to Shields, and an agent posing as an attorney would be unlikely to gain Shields' confidence.

(Bowen Aff. ¶9.) Shields argues that these amount to nothing more than boilerplate assertions of necessity, and that the affidavit fails to address the possibility of using immunity in order to obtain direct evidence against him. If the government believed DeLeo was actually engaging in bribery, Shields posits, it could have granted DeLeo use immunity and forced him to testify against Shields under oath. (Shields Mem. at 11-12.)

The lengths to which Shields has gone to attack DeLeo's credibility elsewhere in his motion to suppress reveals why the option of immunized testimony is inadequate, the government argues. Given that Shields would almost certainly reiterate these attacks at trial, and in light of the government's burden to prove him guilty beyond a reasonable doubt, DeLeo's testimony would not, in the government's view, be an adequate substitute for the evidence which can be obtained through electronic surveillance.

The Court concludes that Bowen's affidavit adequately demonstrated necessity. Shields' sole argument to the contrary presumes that the government could have built its case upon DeLeo's immunized testimony. However, given the nature of the alleged crime involved, the Court agrees that the availability of this option does not undercut the case for electronic surveillance. One might reasonably infer from the evidence Bowen had previously summarized in his affidavit that if Shields were discussing the *Nichols* case with DeLeo and accepting bribe money in exchange for favorable rulings, he was doing so within the confines of his chambers. Although DeLeo appeared willing to relate to Cooley what transpired during his alleged meetings with Shields, quite obviously the government could not be content to rest its case upon DeLeo's immunized testimony.

Indeed, in his attempt to prove deliberate misrepresentations and omissions in Bowen's affidavit, Shields has repeatedly averted to the government's need for evidence corroborating DeLeo's representations to Cooley about Shields. (*See, e.g.*, Shields Mem. at 7 ("the affidavit provides no corroboration for DeLeo's baseless boasts"), 8, 9; App. at 5-6, 11, 14-15, 15, 17, 18-19, 19.) Moreover, in arguing that the affidavit failed to establish probable cause to believe he had engaged in corrupt activity, Shields has directly impugned DeLeo's credibility: "DeLeo is not the 'unquestionably honest citizen' that need not be scrutinized; he is a corrupt lawyer, about whom 'some doubt as to his . . . motives' is appropriate." (Shields Mem. at 10) (citations omitted).[16] At the same time, as the government correctly notes, if DeLeo were to testify under immunity, the Court would instruct the jury to consider his testimony "with caution and great care." *See* 7th Cir. Pattern Instr. No. 3.19. Thus, the need to obtain more direct proof that Shields was engaging in wrongdoing is apparent. *Cf. United States v. Paredes-Moya*, 722 F. Supp. 1402, 1422 (N.D. Tex. 1989) (likely attacks upon informant's credibility at trial, coupled with inevitable instruction that testimony of paid informant should be considered with special care, rendered the immunity alternative to surveillance suggested by defendants inadequate), *judgment aff'd in part, rev'd in part on other grounds*, 928 F.2d 665 (5th Cir. 1991).[17] Moreover, although Shields attacks in boilerplate fashion Bowen's explanation of the reasons why such evidence could not be obtained without the aid of electronic surveillance, he offers no basis for finding any of the particular reasons Bowen articulated to be immaterial or unpersua-

---

16 Such arguments provide an apt example of why this Court does not permit defendants to make blanket adoptions of one another's motions and memoranda, as DeLeo and Shields requested permission to do in this case. (*See* Minute Order dated March 12, 1991) (denying cross-motions to adopt).

17 An additional problem with this scenario is that it assumes DeLeo would in fact testify. Although a grant of immunity may eliminate a witness' entitlement to invoke the Fifth Amendment, it does not, in this Court's experience, ensure that the witness will in fact take the stand.

sive. Finally, the Court notes that grounds for surveillance quite similar to those offered by Bowen were sustained in the face of far more detailed challenges in *Costello*, 610 F. Supp. at 1468-72. *See Zambrana*, *supra*, 841 F.2d at 1329 ("Our Circuit recognizes that 'the government's burden of establishing its compliance with [subsection 2518(1)(c)] is not great,' and that the requirement that the government exhaust 'normal investigative procedures' be reviewed in a 'practical and common-sense fashion.'")

E. Particularity

In addition to the requirements discussed above, Title III requires that the application identify with particularity "the type of communications sought to be intercepted." 18 U.S.C. §2518(1)(b). The statute likewise requires an order authorizing surveillance to include "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates." *Id.* §2518(4)(c). Shields contends that Judge Moran's order of August 29, 1988, fails to meet the latter requirement because it did not designate the type of communications which were to be intercepted and did not incorporate by reference Bowen's affidavit.[18]

The Court does not find the order defective in this respect. Although the order does not set out in a separate section the nature of the communications sought to be intercepted, that information is nonetheless plainly evident from the text of the order. Paragraph A incorporates a finding of probable cause to believe that Shields and DeLeo were engaging in specified offenses. Paragraph B of the order then goes on to set forth a finding of probable cause to believe that oral communications between Shields and DeLeo regarding certain specified aspects of these offenses would be intercepted. The subsequent provisions of the order which actually authorize the surveillance refer back to these paragraphs, thus providing identification of the nature of the oral communications which were to be intercepted. Indeed, it is difficult to discern what

18 Shields apparently concedes that the government's application complied with §2518(1)(b). (*See* Application at 3-4, Ex. A, Shields' Motion to Dismiss Superseding Indictment.)

additional information concerning the nature of these communications could have been incorporated from the application, the adequacy of which in this respect Shields does not challenge. (Compare Application ¶¶ C, D(2) with Aug. 29, 1988 Order ¶B.)

To the extent the order was deficient in this respect, the Court agrees with the government's contention that the deficiency is minimal, and certainly not grounds for suppressing the evidence obtained through surveillance or for dismissing the indictment. At most, any omission amounts to a technical violation of Title III, and Shields has not suggested that he was or is in any way prejudiced by such an omission. Shields does not suggest, for example that Judge Moran was uninformed or misled as to the type of communications which were to be intercepted, or that the government overstepped the intended scope of the authorized surveillance as the result of any ambiguity in the order. In *United States v. Kirkland*, 705 F. Supp. 1572, 1578 (M.D. Ga.), *judgment aff'd without published opinion*, 893 F.2d 1342 (11th Cir. 1989), the court denied a motion to suppress filed on the ground that the order authorizing electronic surveillance contained an ambiguity as to the time period during which surveillance would be permitted. *See* 18 U.S.C. §2518(4)(e). The court reasoned that while this may have amounted to a technical violation of the order, dismissal was not required:

> [V]iolations which neither directly nor substantially implement Congress' expressed desire to restrain law enforcement's resort to or judicial authorization of the wiretap procedures are not violations which demand a finding that communications intercepted thereunder were unlawfully intercepted and therefore must be suppressed. The technical violation at issue in the case *sub judice*, the existence of an ambiguity in the judicial order, is not one which has any bearing upon either the government's decision to seek wiretap authorization or a judge's decision to authorize a requested wiretap.

Id. at 1578. So it is here. In the absence of any showing that the purported omission or ambiguity in Judge Moran's order significantly implicated the rights Title III was intended to protect, dismissal is not

warranted. *See United States v. Donovan*, 429 U.S. 413, 433, 97 S. Ct. 658, 671 (1977) (suppression is an appropriate remedy only in instances where failure to satisfy Title III requirements directly implicates congressional intent to limit interception of wire and oral communications to situations which merit this investigative technique).

F. Constitutionality of Title III as Applied

Shields asserts a one-sentence, boilerplate argument that Title III is unconstitutional, "at least as the statute is interpreted and applied." (Shields Mem. at 13) (footnote omitted.) Absent any articulation whatsoever as to the reasons why the statute might be defective as applied, the Court must dismiss this argument.

G. Disclosure to the Grand Jury without Approval

Shields' final contention is that the indictment must be dismissed because the government improperly disclosed to the grand jury evidence concerning offenses other than those specified in the order authorizing surveillance. Title III permits individuals who have received information regarding a communication through authorized surveillance to disclose the contents of such a communication while giving sworn testimony in any state or federal proceeding. 18 U.S.C. §2517(3). However, the statute also conditions such disclosure upon prior court approval when the communication concerns an offense not identified in the order permitting surveillance:

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom . . . may be used under subsection (3) of this section *when authorized or approved by a judge* of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance

> with the provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. §2517(5) (emphasis supplied). In this case, the authorization order which Judge Moran signed on August 29, 1988, specified two categories of offenses which might be the subject of the oral communications to be intercepted: "offenses involving the interference with commerce by extortion, in violation of Title 18, United States Code, Section 1951, and Racketeering, in violation of Title 18, United States Code, Section 1962."

Shields contends that in seeking an indictment from the grand jury, the government presented evidence regarding oral communications that related to offenses other than these — specifically, evidence regarding the attempt to interfere with commerce through extortion (18 U.S.C. §1951); interstate travel in facilitation of extortion (18 U.S.C. §1952); and making false statements regarding matters within the jurisdiction of a federal agency (18 U.S.C. §1001). These alleged offenses formed the bases for all counts of the indictment with the exception of Count One (conspiracy to interfere with commerce through extortion). Initially, the government did not respond to the merits of Shields' contention, but indicated instead that the issue could be rendered moot by obtaining the requisite authorization, presenting the evidence to the grand jury anew, and obtaining a superseding indictment. (*See* Gov. Mem. at 5758.) The government obtained authorization from Judge Moran on May 21, 1991, and later that month a new grand jury returned a superseding indictment against the defendants identical in all respects to the original.

Shields contends that the superseding indictment does not cure the violation, because the government failed to seek judicial approval for disclosure regarding the additional offenses until it had already made testimonial use of the evidence in securing the original indictment. In making this argument, Shields relies principally upon *United States v. Arnold*, 773 F.2d 823 (7th Cir. 1985). In that case, the government through electronic surveillance had intercepted conversations concerning an offense not specified in the court orders permitting the surveillance. Not until 31 months later, as it prepared to seek an indictment, did the government apply

to the district court for authorization to present evidence concerning these conversations to the grand jury. The requisite approval was obtained, but the defendants later moved to dismiss on the ground that the government had violated its duty under Title III to seek such approval "as soon as practicable." The district court denied the motion, and the Seventh Circuit affirmed. The court of appeals rejected the defendants' argument that the duty to seek judicial approval for disclosure arose at the time of the interception, rather than later when the government intended to make testimonial use of the conversations intercepted. *Id.* at 829-30. The court stressed that the post-interception approval requirement §2517(5) was designed to prevent the government from using authorization to intercept communications concerning one type of crime as a subterfuge to obtain evidence of other crimes for which it lacks probable cause to engage in surveillance. *Id.* at 829.

Thus, the analysis which a court must apply in reviewing a post-interception application §2517(5) for the most part looks backward to the circumstances of the initial order granting the government permission to engage in surveillance; specifically, the court must consider whether the original authorization order was properly obtained, whether it was applied for in good faith and not as a subterfuge, and whether communications of a type not specified in the original order were in fact obtained incidentally. 773 F.2d at 829. In this context, the court reasoned, the length of time between the interception of additional communications and the government's request to make testimonial use of such conversations is immaterial.

> The factors that the court must consider must be present at the time the original application was made — i.e., a showing that the original application met the requirements of probable cause, enumerated serious crime and ineffectiveness of other investigatory techniques as to that offense and further that the application was made in good faith.
>
> § 2518. The mere passage of time between the time of interception and the time of testimonial use does not allow the Government to avoid or evade these factors (probable cause, enumerated crime, ineffectiveness of

> other investigatory techniques and good faith). Because we fail to understand how the passage of time between the time of interception and the time of testimonial use allows the Government to alter these factors, we hold that requiring the Government to submit a judicial application immediately upon intercepting new crimes evidence is unnecessary to satisfy the purpose of §2517(5), i.e., to safeguard a defendant from subterfuge searches and we reject the defendants' novel and ridiculous attempt to read into the statute a statute of limitations on testimonial use.

Id. at 829. Citing the district court's findings that the original authorization had been properly obtained in good faith and not as a subterfuge, and that the defendants had presented no evidence of prejudice resulting from the delay in seeking post-interception approval under §2517(5), the court concluded that the government had made its §2517(5), application "as soon as practicable' before testimonial use was made of the intercepted conversations." *Id.* at 830.

Because in this case the government sought post-interception approval under §2517(5) only after it had already made testimonial use of the additional conversations before the grand jury, Shields argues that the government failed to comply with the "as soon as practicable" requirement of the statute. The appropriate remedy, he argues, is dismissal of the entire superseding indictment or, in the alternative, dismissal of Counts Two through Seven, which relate to conversations covered by §2517(5).

The Court finds dismissal unwarranted under §2517(5). Assuming that there was a violation of §2517(5), dismissal of the original indictment might have been an appropriate remedy in light of the government's failure to obtain judicial approval before it presented evidence to the grand jury. *See United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975). However, the government has cured the omission by obtaining the approval, returning to the grand jury, and securing a superseding indictment. As Shields contends, this procedure does not undo whatever Title III violation there may have been in the first instance; but like the defendants in *Arnold*, Shields is unable to articulate any way in which the circumstances

run afoul of the principles embodied in §2517(5) or in which his rights have been prejudiced.

Whatever technical violation of the statute the government may have committed, Shields has made no showing that the government has engaged in the type of subterfuge which §2517(5) was intended to prevent. As set forth in the previous sections of this opinion, the original authorization to monitor Shields' chambers was lawfully obtained upon the requisite showing of probable cause. There is absolutely no evidence before the Court that the government sought that order in bad faith as a subterfuge for broader surveillance than Judge Moran actually authorized. Nor does Shields contend that the oral communications concerning offenses not specified in the August 29, 1988, authorization were obtained other than incidentally in the course of lawful surveillance. In such circumstances, *Arnold* makes clear that the mere delay between the interception of communications regarding additional offenses and approval to make testimonial use of such communications is not a ground to suppress the evidence, for the delay provides no opportunity for the government to evade the requirements of Title III. *See id.* at 829. For the same reason, the fact that the government initially obtained an indictment through improper testimonial use of the conversations is immaterial now that the defect has been cured, for no subterfuge or evasion of the requirements of Title III has been demonstrated. *See United States v. Kerr*, 711 F.2d 149, 152 (10th Cir. 1983) (finding no error in use of superseding indictment to cure previously unauthorized disclosure to grand jury which returned original indictment); *United States v. Vento*, 533 F.2d 838, 856 (3d Cir. 1976) (return of superseding indictment after approval for disclosure was obtained mooted issue as to government's failure to obtain such approval prior to seeking original indictment).

Moreover, assuming that the government did make improper testimonial use of conversations concerning offenses not specified in the original authorization order, the Court would note that such conversations necessarily would have overlapped to a great degree, if not completely, with conversations which were within the ambit of that order. Indeed, despite Shields' argument to the contrary, the attempt to interfere with commerce by extortion (Counts Two

through Four) *was* an offense specified by the express terms of the August 29, 1988, order; the order does not simply identify "extortion," as Shields represents, but rather "offenses involving extortion," a phrasing which plainly includes attempt. Thus, disclosure of any conversations regarding the attempt charges was not subject to §2517(5).

As to the remaining counts (Counts Five through Seven), the charges which they set forth do not appear to rest upon different conversations or a different type of underlying conduct, but instead upon matters which have little if anything to do with the type of conversations intercepted. For example, the Travel Act charge in this case (Count Five) stands apart from the other extortion-related charges only in that it rests upon the interstate travel of an undercover FBI agent which was allegedly encouraged by the defendants in furtherance of the bribery scheme. But evidence of the agent's travel was not obtained through the interception of oral communications in Shields' chambers; quite obviously it was made known to the government through other means. Moreover, the critical conversation supplying the basis for the government's charge that the travel was encouraged by the defendants was consensually monitored through a body recorder attached to the person of the government's cooperating witness, Robert Cooley; it was not obtained through electronic surveillance of Shields' chambers. Likewise, the false statement charges against Shields (Counts Six and Seven) are founded upon statements which Shields allegedly made directly to FBI agents in interviews with them, not upon oral conversations which were electronically intercepted from Shields' chambers. In sum, it does not appear that any of the charges set forth in these three counts uniquely rest upon or implicate conversations intercepted from Shields' chambers. Rather, any of the intercepted conversations which relate to these counts also relate to the charge set forth in Counts One through Four (conspiracy and attempts to interfere with commerce through extortion), offenses which fell within the ambit of the August 29, 1988, authorization. This makes plain that any violation of Title III which the government committed in making testimonial use of the conversations for the purpose of obtaining an indictment on charges other than those specified in the authorization order was purely technical, and in no way effected

an end run around Title III's protections or a threat to the defendants' rights.[19] Shields' motion to dismiss the superseding indictment on this ground must therefore be denied.

Finally, Shields cites two purported defects in the government's post-interception application for disclosure which he contends renders Judge Moran's approval of the disclosure void. Neither need detain the Court long. First, Shields contends that the application failed to identify the law enforcement officer authorizing the application. See 18 U.S.C. (§2516(1) (listing officers who may authorize applications for the interception of wire or oral communications), 2518(1)(a) (requiring the application for interception to identify the officer who approved the application). This argument holds no merit; an application under §2517(5) is not an application to intercept communications, but a request for authority to make testimonial use of communications already intercepted. Section 2517(5) does not require than any of the officers identified in §2516(1) must approve an application made under §2517(5), nor does it require the application identify the officer who supplied such approval, and Shields cites no authority for the proposition that such a requirement should be read into the statute.

Second, Shields argues that the application failed to establish that the August 29, 1988, order permitting surveillance was properly obtained, that the government acted in good faith and not in

---

19 In *Brodson*, *supra*, 528 F.2d at 216, the court of appeals concluded that the overlap of approved and unapproved offenses did not excuse the government's failure to comply with §2517(5). In the court's view, the government's violation of the statute was controlling. *Id.* However, *Arnold* appears to signal a less rigid approach to violations of Title III, emphasizing as it does the purposes of the statute, the import of the violation, and the prejudice, if any, to the defendant. *See* 773 F.2d at 830-31. The Court believes it consistent with this approach to consider whether and to what extent the charges not identified in the authorization order share an evidentiary foundation with charges which were identified. *See* the district court's opinion in Arnold, 576 F. Supp. 304, 309 (N.D. Ill. 1983) (Nordberg, J.).

Second, Shields argues that the application failed to establish that the August 29, 1988, order permitting surveillance was properly obtained, that the government acted in good faith and not in subterfuge in seeking the order, and that the additional communications were intercepted incidentally to the authorized surveillance. *See Arnold*, 773 F.2d at 829. This contention also fails. Section 2517(5) does not impose any specific requirements on the contents of the post-interception application, and although *Arnold* identifies the showing which the government must make in order to secure approval under §2517(5), the contents of Judge Moran's order granting the approval reflect that such a showing was made to his satisfaction. Thus, Judge Moran expressly found that the communications concerning additional offenses were obtained in compliance with Title III, and that the authorization to engage in surveillance had been "lawfully obtained and sought in good faith by the applicants for the purpose of investigating the offenses described in that order." (Order of May 21, 1991 at 6 ¶3.) Given his familiarity with the circumstances of the authorization orders, and in light of the facts which were set forth in the government's §2517(5) application, Judge Moran had a substantial basis for concluding that the government had satisfied the requirements of *Arnold*. That the government did not formally recite the considerations set forth in *Arnold* is immaterial, particularly in the absence of any showing that these considerations were not met.

IV. CONCLUSION

For the reasons set forth above, Shields' motions to suppress evidence and to dismiss the superseding indictment based upon illegal electronic surveillance is denied. DeLeo's motion to suppress or dismiss the superseding indictment upon the same grounds is denied for the same reasons.

ENTER:

ILANA DIAMOND ROVNER
UNITED STATES DISTRICT JUDGE

Dated: July 30, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	No. 90 CR 1044
	)	Hon. Ilana D. Rovner
DAVID J. SHIELDS and	)	
PASQUALE F. DELEO,	)	
	)	
Defendants.)		

MEMORANDUM OPINION AND ORDER

Pending before the Court is the government's renewed motion to admit evidence pursuant to Fed. R. Evid. 404(b) indicating that defendant Pasquale F. DeLeo has purportedly engaged in bribery on prior occasions. In a memorandum opinion and order dated August 1, 1991, the Court granted defendants' motions to preclude introduction of this evidence in the government's case-in-chief. The Court acknowledged that such evidence might bear upon DeLeo's intent with respect to the acts alleged in this case. (Mem. Op. at 3.) However, it also noted that the evidence tended to implicate DeLeo's propensity to engage in wrongdoing, a characteristic of which Rule 404(b) expressly forbids proof. (*Id.* at 4.) Concerned about this aspect of the proffered evidence, the Court precluded the government from introducing it in its case-in-chief. (*Id.* at 6.) At the same time, the Court expressly reserved the right to reconsider its ruling in the course of trial, noting that the defendants might open the door to admission of the evidence in the event they argued defenses such as entrapment or rainmaking. (*Id.* at 6-7.)

Prior to the close of the government's case-in-chief, the government asked the Court to reconsider its ruling and allow former Cook County Circuit Court Judge Frank Salerno that he had accepted bribes from DeLeo in the past. The government argued for the admission of this testimony on two grounds: (1) The testimony would establish that it was DeLeo's practice to pay judicial bribes silently, thus explaining the lack of any audible evidence of such payments on the tapes in this case (a matter to which counsel for co-defendant David J. Shields had called attention); and (2) DeLeo appeared either to be asserting an entrapment or a rainmaking defense, thus rendering the testimony proper as a means to rebut these defenses. After hearing Salerno's testimony outside the presence of the jury, the Court denied the government's motion. The Court concluded that Salerno's testimony was not sufficiently probative of DeLeo's purported routine in paying judicial bribes; it also noted that DeLeo had expressly disavowed any intent to raise an entrapment defense and had not yet raised a rainmaking defense. Accordingly, the Court reaffirmed its earlier decision to preclude Salerno's testimony.

The status quo in this regard changed on September 6, 1991. On that day, DeLeo's counsel tendered to the Court a supplemental set of theory-of-defense instructions. Among these was a proposed instruction which made clear that DeLeo planned to assert the rainmaking defense which Shields had raised at the start of trial:

> DeLeo argues, as one of his theories of defense, that the evidence presented shows that DeLeo scammed monies from Robert Cooley in August and September, 1988. It is DeLeo's position that if you find from a review of all the evidence that this is what happened and that there was no bribery involving Judge Shields, then you must acquit DeLeo on Counts 1 through 5 of indictment 90 CR 1044.

(DeLeo's Instruction 16.) The government contends that in light of this instruction, it should be permitted to present the testimony of Salerno in order to rebut this defense and to prove that when DeLeo accepted money from Cooley (the government's cooperating wit-

ness), he did so with the intent to bribe Shields rather than to scam Cooley and pocket the money.

The Court agrees and finds the evidence admissible for this purpose. *United States v. Tuchow*, 768 F.2d 855, 864 (7th Cir. 1985) is directly on point. In that case, one of the defendants (Farina) argued that when he accepted money from the government's cooperating witness (Walsh) ostensibly to obtain an illegal building permit, he was really conning Walsh out of his money. The court held it proper in this circumstance to admit evidence that Farina had previously obtained a job for Walsh's nephew in exchange for $2,500 and fixed a drunk driving ticket for $1,000. *Id.* at 864.

> The evidence that Farina obtained a job for Walsh's nephew for $2,500 and fixed a drunk driving ticket for another $1,000 was relevant in establishing that Farina did not intend to "con" Walsh. This evidence indicated, similar to obtaining the job for Walsh's nephew and fixing the drunk driving ticket, that Farina intended to follow through on his promise to help Walsh obtain the building permit. Thus, the "other acts" evidence was relevant in establishing his intent to engage in a conspiracy with [his co-defendant] Tuchow in order to obtain the illegal building permit.

Id. See also United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991); *United States v. Price*, 617 F.2d 455, 459-60 (7th Cir. 1979). Just as in *Tuchow*, it is now clear that DeLeo intends to argue that he was simply conning Cooley when he accepted money and said that he would use it to bribe Shields. In this context, Salerno's testimony is properly admissible. The proffered evidence bears directly upon a matter which DeLeo has now placed in issue — his intent — and this is one of the matters other than propensity to commit the alleged offense which Rule 404(b) expressly identifies. *See generally United States v. McAnderson*, 914 F.2d 934, 945 (7th Cir. 1990). Moreover, although the acts of bribery to which Salerno would testify are not identical to those alleged in this case, they are sufficiently similar to be probative of DeLeo's intent vis a vis Cooley and Shields. *See generally McAnderson*, 914 F.2d at 945. *See also York*, 933 F.2d at

1351 ("[t]he prior acts need not be duplicates of the one for which the defendant is now being tried"); *see Tuchow*, 768 F.2d at 864 ("[t]his type of conduct of bribing government officials is indistinguishable from obtaining an illegal building permit"). At the same time, the events to which Salerno will testify are not remote in time from the conduct at issue here; Salerno will testify that he accepted bribes over a period of approximately eighteen months in the years 1983 and 198, about four to five years before DeLeo allegedly accepted money from Cooley to bribe Shields. (See Tr. at 1469-70.) Third, having heard Salerno's testimony on voir dire, the Court has no question that the jury could find that the bribes were paid to Salerno and that DeLeo paid them. *See generally McAnderson*, 914 F.2d at 945. Finally, given that DeLeo has now placed his intent in question by raising the rainmaking defense, the probative value of Salerno's testimony as proof of DeLeo's intent has increased substantially, enough so that it substantially outweighs whatever potential for prejudice it might have. *See York*, 933 F.2d at 1349.

The fact that DeLeo has not put on any evidence does not preclude the admission of Salerno's testimony. His evident intent to argue that he was scamming Cooley suffices to render the evidence relevant and admissible. *Cf. Price*, 617 F.2d at 459 (by raising intent in opening statements, defense opened door to Rule 404(b) evidence). *See also id.* at 460 (even if defense had not treated intent as a real issue, government's burden of proving intent in Hobbs Act case would suffice to permit admission of the other acts evidence). Moreover, DeLeo cannot bar the evidence simply because he waited to reveal this defense until the government's case-in-chief had closed and he had rested. Repeatedly throughout the government's case-in-chief, DeLeo's counsel were asked about the nature of DeLeo's defense, and repeatedly counsel disclaimed any present intent to assert entrapment or rainmaking as defenses. (*See* Tr. at 1335-36, 1385, 1521.) Had the rainmaking defense been acknowledged at that time, the Court likely would have admitted Salerno's testimony in the government's case-in-chief. This DeLeo and his counsel knew without question. That the disclosure was not made until the government had begun its rebuttal case is immaterial. DeLeo's intent is as much in issue now by way of his theory-of-defense instruction as it would have been had his counsel

outlined this theory in opening statements. Accordingly, the government is entitled to meet that defense in its rebuttal case by offering Salerno's testimony.

For all of the reasons set forth above, the government's renewed motion to admit the testimony of Salerno pursuant to Rule 404(b) is granted. The Court will deliver an appropriate limiting instruction contemporaneously with the admission of Salerno's testimony. *See Tuchow*, 768 F.2d at 864.

ENTER:

ILANA DIAMOND ROVNER
UNITED STATES DISTRICT JUDGE

Dated: September 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	)	
	)	No. 90 CR 1044
DAVID J. SHIELDS and PASQUALE F. DELEO, *Defendants-Appellants.*	)	Ilana Diamond Rovner, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendants-appellants on August 12, 1993, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

[1] Chief Judge William J. Bauer and Circuit Judges Joel M. Flaum, Kenneth F. Ripple and Ilana Diamond Rovner took no part in the consideration or decision in this matter.

(2)

Supreme Court, U.S.
FILED
DEC 27 1993
OFFICE OF THE CLERK

No. 93-618

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID J. SHIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether an alleged violation of 18 U.S.C. 2517(5), which governs the disclosure of court-authorized electronic surveillance, requires dismissal of a superseding indictment returned after any violation was cured by an expanded disclosure order.

2. Whether the district court correctly admitted evidence of petitioner's co-defendant's prior bad acts under Rule 404(b) of the Federal Rules of Evidence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Grand Jury Supboena Served on Doe, In re, 889 F.2d 384 (2d Cir. 1989), cert. denied, 494 U.S. 1079 (1990) 11

Huddleston v. *United States*, 485 U.S. 681 (1988) 11

United States v. *Arnold*, 773 F.2d 823 (7th Cir. 1985) 7, 11

United States v. *Brodson*, 528 F.2d 214 (7th Cir. 1975) 10

United States v. *Kerr*, 711 F.2d 149 (10th Cir. 1983) 11

United States v. *Marion*, 535 F.2d 697 (2d Cir. 1976) 10

United States v. *Southard*, 700 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 823 (1983) 11

United States v. *Vento*, 533 F.2d 838 (3d Cir. 1976) 11

Statutes and rule:

Hobbs Act, 18 U.S.C. 1951 ..... 2, 3, 4, 9, 10, 11

Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.*:

- 18 U.S.C. 2510-2521 ..... 3, 8
- 18 U.S.C. 2511 8
- 18 U.S.C. 2515 8
- 18 U.S.C. 2516 8-9
- 18 U.S.C. 2517(3) 9
- 18 U.S.C. 2517(5) 4-5, 6, 8, 9, 11

Statutes and rule—Continued: Page

Travel Act, 18 U.S.C. 1952 ..... 2, 3, 4, 9
18 U.S.C. 1001 2
18 U.S.C. 1084 10
18 U.S.C. 1955 10
Fed. R. Evid. 404(b) 5, 6, 11

In the Supreme Court of the United States

OCTOBER TERM, 1993

NO. 93-618

DAVID J. SHIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 999 F.2d 1090. The opinion of the district court denying petitioner's motion to dismiss the indictment and suppress evidence (Pet. App. A18-A79) is reported at 783 F. Supp. 1058. The opinion of the district court granting the government's motion to admit evidence under Fed. R. Evid. 404(b) (Pet. App. A80-A84) is unreported. Related opinions of the district court are reported at 767 F. Supp. 163, 783 F. Supp. 1052, 783 F. Supp. 1094, 783 F. Supp. 1106, and 793 F. Supp. 768.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1993. A petition for rehearing was denied on August 27, 1993. Pet. App. A85. The petition for a writ of certiorari was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; three counts of attempting to commit extortion, also in violation of the Hobbs Act; one count of causing a person to travel in interstate commerce to facilitate bribery, in violation of the Travel Act, 18 U.S.C. 1952; and two counts of making false statements to agents of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001. He was sentenced to 37 months' imprisonment, to be followed by three years of supervised release, and fined $6,000. The court of appeals affirmed. Pet. App. A1-A17.

1. Petitioner was the Chief Judge of the Chancery Division of the Circuit Court of Cook County, Illinois. The Chancery Division is the division of the Circuit Court that is responsible for hearing civil cases in which the parties are seeking injunctions and other equitable relief. As Chief Judge, petitioner had general administrative power over the Chancery Division and its other judges, in addition to having responsibility for hearing and deciding cases that were assigned to him. Indictment 1; Pet. App. A1.

As part of an FBI investigation into corruption in the Illinois state court system, federal agents created the fictional lawsuit of *Nichols* v. *Wilson*, a dispute between two partners

in an investment business. Nichols claimed that Wilson had wrongfully appropriated $350,000 in partnership funds. The two parties and Wilson's lawyer were actually FBI agents, and Nichols was represented by Robert Cooley, a corrupt attorney acting as a government informant. On July 12, 1988, the case was filed in the Chancery Division and randomly assigned to petitioner. Gov't C.A. Br. 3-4.

The agents wanted to have the case reassigned to the docket of a different judge, who Cooley believed was corrupt. Cooley asked Pasquale DeLeo, his former law partner and petitioner's co-defendant, to help get the case reassigned. DeLeo told Cooley that it was unnecessary to have the case transferred to a different judge because petitioner would accept bribes to fix the case. DeLeo also agreed to act as a middleman. On three separate occasions in August and September of 1988, Cooley paid bribe money to DeLeo, who then passed it on to petitioner in exchange for favorable rulings for Cooley's fictional client. Gov't C.A. Br. 1-8; Pet. App. A2-A4.

2. On August 29, 1988, the government obtained a court order authorizing it to conduct electronic surveillance of petitioner's judicial chambers pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521. The order authorized the government to intercept communications relating to "offenses involving the interference with commerce by extortion and conspiracy to do so" in violation of the Hobbs Act, 18 U.S.C. 1951; the order did not specify either Travel Act or false statement offenses. Gov't C.A. Br. 13; Pet. App. A18, A72. On August 31 and September 2, 1988, the government intercepted incriminating conversations between petitioner and DeLeo. In the August 31 conversation, petitioner and DeLeo discussed that it was "nice to have an inside track" in *Nichols* v. *Wilson*. In the September 2 conversation, DeLeo told peti-

tioner to "stall it 'till next week and the case will be settled." Petitioner agreed to "stall" the case. See Gov't C.A. Br. 7-8; Pet. App. A6, A8.

Federal prosecutors disclosed those and other intercepted communications to a grand jury sitting in the Northern District of Illinois. On December 19, 1990, the grand jury returned a seven-count indictment charging petitioner with violating the Hobbs Act, the Travel Act, and the federal false statement statute.

Petitioner moved to dismiss the indictment. He claimed that in seeking an indictment on the Travel Act and false statement charges, which were not specified in the order authorizing the electronic surveillance, the government had violated 18 U.S.C. 2517(5), which provides that when the government intercepts "communications relating to offenses other than those specified in the order of authorization or approval," those communications may be disclosed to a grand jury only "when authorized or approved by a judge of competent jurisdiction." See Pet. App. A71.

In response to petitioner's motion, the prosecution moved to dismiss the indictment, and the court granted the motion. The prosecutors then obtained a judicial order pursuant to 18 U.S.C. 2517(5) authorizing disclosure of the intercepted communications in relation to the Travel Act and the false statement statute, and the prosecutors subsequently disclosed the communications to a different grand jury. That grand jury returned a superseding indictment that was identical to the first indictment, charging violations of the Hobbs Act, the Travel Act, and the false statement statute. See Pet. App. A74.

Petitioner claimed that the superseding indictment should be dismissed as well, but the district court rejected his claim. The court held that the expanded disclosure order and the superseding indictment cured any possible violation of Sec-

tion 2517(5) and removed any prejudice that petitioner might have suffered. The court explained (Pet. App. A75-A77):

> Whatever technical violation of the statute the government may have committed, [petitioner] has made no showing that the government has engaged in the type of subterfuge which § 2517(5) was intended to prevent. As set forth in the previous sections of this opinion, the original authorization to monitor [petitioner's] chambers was lawfully obtained upon the requisite showing of probable cause. There is absolutely no evidence before the Court that the government sought that order in bad faith as a subterfuge for broader surveillance than [was] actually authorized. * * *
>
> Moreover, assuming that the government did make improper testimonial use of conversations concerning offenses not specified in the original authorization order, the Court would note that such conversations necessarily would have overlapped to a great degree, if not completely, with conversations which were within the ambit of that order. * * *
>
> [A]ny violation of Title III which the government committed * * * was purely technical, and in no way effected an end run around Title III's protections or a threat to [petitioner's] rights.

3 Prior to trial, the government moved in limine for an order permitting the government to introduce evidence of DeLeo's prior bribery of another former Cook County judge, Frank Salerno, arguing that the evidence of that bribery was admissible under Fed. R. Evid. 404(b). The district court denied the motion, but warned petitioner and DeLeo that they "might open the door to admission of the evidence in the event they argued defenses such as entrapment" or "rainmaking," *i.e.*, the argument that DeLeo had cheated

Cooley by taking the bribe money without passing it on to petitioner. Pet. App. A80-A81.

On September 6, 1991, DeLeo's counsel submitted proposed jury instructions that articulated a rainmaking defense. One instruction stated that "DeLeo argues, as one of his theories of defense, that the evidence presented shows that DeLeo scammed monies from Robert Cooley in August and September, 1988. It is DeLeo's position that if you find from a review of all the evidence that this is what happened and that there was no bribery involving [petitioner], then you must acquit DeLeo." Pet. App. A81. Based on DeLeo's submission of this instruction, the government renewed its motion for admission of the Rule 404(b) evidence. The district court granted the motion, explaining (Pet. App. A82):

> [I]t is now clear that DeLeo intends to argue that he was simply conning Cooley when he accepted money and said that he would use it to bribe [petitioner]. In this context, Salerno's testimony is properly admissible. The proffered evidence bears directly upon a matter which DeLeo has now placed in issue—his intent—and this is one of the matters other than propensity to commit the alleged offense which Rule 404(b) expressly identifies.

The evidence was admitted with a limiting instruction stating that the evidence was relevant only to the issue of DeLeo's intent. *Id.* at A16, A84. The jury returned a verdict of guilty on all counts.

4. The court of appeals affirmed. The court held that petitioner's argument that the indictment should be dismissed for a violation of 18 U.S.C. 2517(5) "fails on several grounds" (Pet. App. A10-A11, citations omitted):

> First, the defendants raised this issue in the district court and the government corrected any problem by obtaining a judicial order approving the release of information

> about Travel Act and false statement charges. It then voided the first indictment and took the case before a second and uninfected grand jury * * *. Thus the [superseding] indictments under which [petitioner] and DeLeo were convicted were not tainted. Second, it would have been impossible for the government to obtain authorization to wiretap based on false statement allegations because [petitioner] was not suspected of this crime until after the wiretapping began; the false statements were made by [petitioner] to the FBI at the tail end of the case. Third, the Travel Act and false statement charges were based on the same set of facts as the Hobbs Act violation. Since the government was free to release this information to a grand jury anyway under the Hobbs Act authorization, it is difficult to see how the defendants were harmed when the same facts were presented in the context of different offenses. It is true that empaneling a second grand jury will not cure an indictment based on unauthorized wiretapping. In this case, however, the government's indiscretion was not unauthorized wiretapping * * * but the disclosure of what it learned. * * * In [*United States* v. *Arnold*, 773 F.2d 823 (7th Cir. 1985)], we held that belated approval would cure a defective original authorization if the original order was lawfully obtained, sought in good faith, and the questionable communication was incidentally intercepted during the course of a lawfully executed order. Each condition was met in this case.

The court also rejected petitioner's argument that evidence of DeLeo's prior bribery of Judge Salerno should have been excluded. The court disagreed with petitioner that DeLeo's intent was irrelevant to the case, finding (Pet. App. A15) that DeLeo's "rainmaking defense * * * implicates intent because the defendant attempts to attach an innocent explana-

tion to otherwise inculpatory behavior." Indeed, the court stated that "DeLeo's intent either to bribe [petitioner] or merely con Cooley was the central question of the case." *Ibid.*

The court also disagreed with petitioner's claim that he was unfairly prejudiced by the admission of evidence of DeLeo's prior bribery of other judges (Pet. App. A15-A16): "Rule 404(b) is designed to prevent the admission of propensity evidence. Here, the Salerno bribes reflected on the characters of Salerno and DeLeo, but they conveyed nothing at all about [petitioner]." Thus, the court found, the evidence did not unfairly prejudice petitioner. In any event, the court noted that "the judge told jurors repeatedly and gave jurors an instruction to the effect that Salerno's testimony was relevant only to the issue of DeLeo's intent; that was sufficient." *Id.* at A16.

ARGUMENT

1. The court of appeals correctly rejected petitioner's claim that the superseding indictment should have been dismissed for a violation of 18 U.S.C. 2517(5). As petitioner concedes (Pet. 8), its ruling does not conflict with any decision of this Court or another court of appeals. Review by this Court is therefore not warranted.

a. The interception and disclosure of wire, oral, and electronic communications is regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. 2510-2521. Section 2511 generally prohibits the interception and disclosure of such communications, and Section 2515 specifically prohibits the disclosure of such communications in judicial proceedings, including grand jury proceedings.

Title III does permit interception and disclosure of wire or oral communications under certain circumstances. Section

2516 provides that a federal or state judge of competent jurisdiction may authorize interception of such communications, upon an application authorized by any of certain state and federal officials, if the interception may provide evidence of certain designated offenses, including violations of the Hobbs Act. Section 2517(5) in turn permits disclosure of lawfully intercepted communications relating to "offenses other than those specified in the order of authorization or approval," so long as a judge of competent jurisdiction finds that "the contents were otherwise intercepted in accordance with the provisions of this chapter."

b. Petitioner does not contend that the government illegally intercepted any communications in this case, or that it acted in bad faith in disclosing any of the intercepted communications. Indeed, he concedes that all the disclosed communications were relevant to the Hobbs Act violation specified in the initial order authorizing the surveillance, and therefore were properly disclosed to both grand juries in relation to that offense. Rather, petitioner claims that, because the original indictment charged offenses not specified in the initial surveillance order, the superseding indictment that was returned after the expanded disclosure order must be dismissed. That claim is without merit.

Under Section 2517(3), the government was authorized to disclose all of the intercepted communications in this case to the first grand jury. As both courts below recognized (Pet. App. A11, A75), the intercepted communications that established petitioner's violations of the Travel Act and false statement statute also established his violations of the Hobbs Act. Because the initial order authorizing the surveillance specified violations of the Hobbs Act, and because all intercepted communications related to those violations, the government was permitted to disclose all of the communications. Thus, even without the expanded disclosure order, there was no

violation of Title III. As the court of appeals explained (Pet. App. A11), "[s]ince the government was free to release this information to a grand jury anyway under the Hobbs Act authorization, it is difficult to see how the defendants were harmed when the same facts were presented in the context of different offenses."[1]

Moreover, any possible violation was cured when the government obtained the expanded disclosure order and then disclosed the communications to the second grand jury. As the court of appeals stated, "belated approval * * * cure[s] a defective original authorization if the original order was lawfully obtained, sought in good faith, and the questionable communication was incidentally intercepted during the course of a lawfully executed order." Pet. App. A11.

Petitioner concedes (Pet. 8) that no court has adopted his view that where an initial indictment charges offenses not specified in the initial surveillance authorization, a superseding indictment returned after an expanded disclosure order must be dismissed. To the contrary, both of the other courts of appeals that have considered the question have held that the return of a superseding indictment following judicial au-

[1] In *United States* v. *Brodson*, 528 F.2d 214, 215-217 (1975), the Seventh Circuit held that absent an expanded disclosure order, communications properly intercepted pursuant to an order specifying violations of 18 U.S.C. 1955 could not be disclosed to a grand jury in relation to charges under 18 U.S.C. 1084, when charges under the former statute were not sought. Similarly, in *United States* v. *Marion*, 535 F.2d 697, 703-707 (1976), the Second Circuit, following *Brodson*, held that communications properly intercepted pursuant to an order specifying state law violations could not be disclosed to a federal grand jury in relation to federal Hobbs Act and conspiracy charges. As the court below recognized in its discussion of *Brodson*, those cases are distinguishable because they "involved an indictment on different grounds entirely than the original authorization rather than, as here, additional grounds." Pet. App. A11.

thorization cures any defect. See *United States* v. *Vento*, 533 F.2d 838, 855-856 (3d Cir. 1976); *United States* v. *Kerr*, 711 F.2d 149, 151-152 (10th Cir. 1983).

Contrary to petitioner's suggestion (Pet. 6), this construction of the statute does not create an "exception * * * that swallows the rule" of Section 2517(5). That Section "is designed to prevent subterfuge searches." *United States* v. *Arnold*, 773 F.2d 823, 829 (7th Cir. 1985); see *United States* v. *Southard*, 700 F.2d 1, 31 (1st Cir.), cert. denied, 464 U.S. 823 (1983). Where the three-part test articulated by the court of appeals (Pet. App. A11) is satisfied—*i.e.*, where the interception order was lawfully obtained, where the order was sought in good faith, and where the questionable communication was incidentally intercepted during the course of a lawfully executed order—there is no danger of a subterfuge search. See *In re Grand Jury Subpoena Served on Doe*, 889 F.2d 384, 387-388 (2d Cir. 1989), cert. denied, 494 U.S. 1079 (1990).[2]

2. Petitioner also claims that the district court misapplied Fed. R. Evid. 404(b) when it admitted evidence of DeLeo's prior bribery of Judge Salerno. Rule 404(b) prohibits the use of similar act evidence "to prove the character of a person in order to show action in conformity therewith." The rule specifically provides, however, that such evidence may be admissible "for other purposes, such as proof of * * * intent." See *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988). And as the court of appeals noted, DeLeo's intent was "the central question of the case." Pet. App. A15.

[2] In any event, petitioner does not claim that the government engaged in a subterfuge search in this case. Rather, as noted above, he concedes that the government properly intercepted all the communications in this case pursuant to the initial authorization order that specified violations of the Hobbs Act.

Contrary to petitioner's contention (Pet. 10), neither the district court nor the court of appeals sanctioned the admission of evidence of DeLeo's prior bribery to prove his character, and both expressly noted that evidence is not admissible under the Rule to prove the defendant's propensity to commit the crime charged. Pet. App. A14-A15, A82. Rather, the courts below allowed the admission of the evidence solely to prove that DeLeo's intention was to bribe petitioner. As the court of appeals explained, "both defendants asked the jury to believe that DeLeo's actions toward [petitioner]—handing the judge an envelope, talking to the judge behind closed doors, etc.—were innocent." *Id.* at A15. The evidence showing that DeLeo had bribed Judge Salerno helped to rebut that defense and supported the government's argument that DeLeo intended to bribe petitioner, just as evidence showing that DeLeo had deceived someone into believing that he had bribed Judge Salerno would have supported the defendants' claim that DeLeo intended to deceive his former partner in this case. Moreover, as the court of appeals noted, the district court instructed the jury that it should consider the evidence "only [for] the issue of DeLeo's intent." See *id.* at A16. With that limiting instruction, the evidence was properly admitted.

In any event, the admission of the evidence did not harm petitioner. As the court of appeals noted, "the Salerno bribes reflected on the characters of Salerno and DeLeo, but they conveyed nothing at all about [petitioner]." Pet. App. A15-A16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

DECEMBER 1993

☆ U.S. GOVERNMENT PRINTING OFFICE 1993—301-157/86073